Jurisdictional Statement

81-477

No.

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN THE MATTER OF DONALD M. WITTE,

Appellant,

On Appeal from the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether, consistent with the Due Process Clause of the Fourteenth Amendment, Section 1, a fair, just, unprejudiced, unbiased and equitable hearing was provided by a state which adopted a court rule (Rule 5.18, Supreme Court of Missouri) concerning the disciplining of attorneys by a hearing wherein a court appointed master heard the evidence and filed his findings of facts and conclusions with the Court, which found the attorney not guilty to the charges, only to have the highest court of the state on a trial de novo on the record find the attorney guilty and ordered him disbarred without ever seeing the witnesses, where the veracity of the complaining witness was challenged by the attorney in his answer to the information and where the master found the testimony of the complaining witness to be vague, contradictory, confusing and lacked believability and that the complaining witness failed to disclose all fact and circumstances.

2. Whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Section 1 a state may discipline an attorney in a manner different than other professions, where the court on a trial de novo on the record tries an attorney and retains the right to determine credibility, weight and value of the evidence and all factual issues necessary for the decision; however, in the review of all other professions, the court hears the appeal as an administrative judicial review, so that the court must accept the administrative findings, unless it was clearly contrary to the overwhelming weight of the evidence, when the evidence was viewed in light most favorable to the findings of the trier of fact.

3. Whether, consistent with the Due Process Clause of the Fourteenth Amendment, Section 1, a state may discipline an attorney for a charge not contained in the Information, or a charge not specifically set out in the information or a charge that is not supported by the preponderance of the evidence.

4. Whether, consistent with the Due Process Clause of the Fourteenth Amendment, Section 1, a state may discipline an attorney and order him disbarred by containing in the opinion of the court an erroneous statement as to the ultimate finding and conclusion of the Master, or a partial quote of context from the master, or erroneous inferences as to the knowledge of the attorney as to certain physical and mental conditions of the complaining witness, or to erroneous or misleading statements as to the marital status of the complaining witness and the physical condition of the complaining witness, or a partial and out-of-context statement as to the status of the attorney's checking account.

5. Whether, consistent with the Due Process Clause and the protection against Cruel and Unusual Punishment within the privileges or immunities clause granted citizens of the United States by the Fourteenth Amendment, a state may discipline an attorney with no prior disciplinary problems and a good character by ordering him disbarred for allegedly commingling $118.00 from two settlements, where the court had never invoked such a severe punishment previously for such a violation, or has any other state.

PARTIES TO THE PROCEEDING

The appellant, Donald M. Witte, is a lawyer who was disciplined by the court below.

The appellees are the members of the Bar Committee of the Twenty-First Judicial Circuit, in St. Louis County, Missouri, established by Rule 5 of the Supreme Court of Missouri, who filed an information in that court seeking the reprimanding, suspending or disbarring of the appellant. They are Arthur H. Slonim, Chairman; Charles M. Schmidt, Secretary; Louis S. Czech; Arthur K. Rehm; A. Wimmer Carr; and George G. Bude.

Because the case presents issues of constitutionality of rules of the Missouri Supreme Court, 28 USC Section 2403(b) may be applicable and copies of the Notice of Appeal and Jurisdictional Statements have been served on the Honorable Christopher C. Bond, Governor of the State of Missouri and upon the Honorable John Ashcroft, Attorney General of the State of Missouri, pursuant to this Court's rule 28.4(c.)

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OPINIONS BELOW

The opinion of the Supreme Court of Missouri, together with the opinion concurring in part and dissenting in part of Morgan, J., is reported 615 S.W.2d 421 (en banc 1981). The case was filed originally in the Supreme Court of Missouri, and there are no other opinions, however, the Master appointed by the court and who heard the evidence did file his Findings and Recommendations with the Supreme Court of Missouri.

JURISDICTION

The opinion of the Supreme Court of Missouri was filed on May 11, 1981 and judgment disciplining the appellant ordered him disbarred. The opinion concurring in part and dissenting in part supported by 3 of the 7 judges stated as its conclusion, "If the reprimand suggested by the master is not adequate, undoubtedly a suspension limited to one year would be." Motion for Rehearing was filed on May 26, 1981 (App. 33) and overruled on June 8, 1981.

Notice of Appeal to this Court was filed in the Supreme Court of Missouri on July 6, 1981.

This case involves the constitutionality of Rule 5 of the Supreme Court of Missouri and in particular Rules 5.15 and 5.18. The appellant first raised the Constitutional question in his Motion for Rehearing (App. 33), however, the Court summarily overruled this motion. The appellant again raised the Constitutional question in his Motion to Rescind the Present Mandate and Motion to Stay Issuance of Mandate, which the Court granted without comment upon the issues raised by appellant.

CONSTITUTIONAL PROVISIONS AND COURT RULES

Constitution, Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person without its jurisdiction the equal protection of the laws.

Rule 5.15, Supreme Court of Missouri

Form of Information

The Information shall be styled — "In re: (Name of Respondent)," and shall set forth in brief form the specific act or acts of misconduct charged and shall be signed by the Chairman and Secretary, or by a majority of the members of the Committee. Any number of acts may be charged in the same Information but shall be separately stated.

Rule 5.18, Supreme Court of Missouri

Trial and Disposition of Cause

Upon the filing of an answer or after the lapse of 30 days after service of summons if no pleading be filed by the Respondent, this Court shall proceed to hear the cause or shall refer the matter to a Master appointed by this Court. If the matter be referred to a Master appointed by this Court, the matter shall proceed as provided in Rule 68.03. If tried by the Court, the trial shall be without a jury and shall be governed by the law of evidence applicable to civil proceedings. If the Court finds for the Respondent, it shall dismiss the Information. If the findings be that the charges are true, the Court shall render a judgment finding Respondent guilty and shall reprimand the Respondent or suspend him from practice for an indefinite period or a time fixed in the discretion of the Court or disbar him, as shall to the Court seem proper. If the Respondent is a member of the Bar of this state and is also licensed in any other state, a copy of this Court's findings shall be forwarded to the appropriate disciplinary authorities of the other state wherein such attorney is licensed. If the Respondent is a member of the Bar of another state and not of this state, and the charges are found to be true, this Court shall reprimand the Respondent or enjoin him from practicing law within the state of Missouri for a time fixed in the discretion of this Court and a copy of this Court's order shall be forwarded to the appropriate disciplinary authorities of the state wherein such attorney is licensed. Costs shall be taxed as the Court, in its discretion, may order.

STATEMENT OF THE CASE

Appellant has been diciplined for allegedly violating Missouri Supreme Court Rule 4, DR 1-102(A)(1), (5), 9-102(A), 9-102(B)(1), (3) and (4) for allegedly commingly $118.60 of his client's funds. The Respondent was charged with seven alledged acts of professional misconduct in the Information (App. 75). These charges concerned the settlement of two contingent fee cases by the appellant. The client claimed that she had not signed the releases, Stipulation for Dismissal or settlement drafts, in January, 1974 and November, 1974. The Appellant testified that he kept the client informed of the handling of these matters and that at the time the documents were signed, he usually left them with his secretary for the client to come in and sign, or took them by the home for signature, or mailed them to the client, however, due to the time elapsed and the small amount of the settlements, he had no direct recollection of the signing of these documents. The Bar Committee had a handwriting expert use ten checks claimed to be signed by the client as exemplaries to compare to the disputed documents with the client's signature and the appellant's signatures on them, two settlement statements prepared by the appellant and admittedly signed by the client and the original Agreement retaining the appellant, which was signed by the client. The handwriting expert testified that he could not identify any of the questioned signatures of the client on the documents, as being made by the appellant. Further, he found similar type discrepancies in the disputed documents and the two settlement statements that the client recalled signing. His conclusion was that the client did not sign either the disputed documents or the settlement statements, and that the personality of the person who signed these documents was lost. The attorney for the Bar Committee at the oral argument before the Supreme Court of Missouri acknowledged that the handwriting expert was wrong as to the client not signing the two settlement statements. The expert witness testified that in his opinion the first release signed was a tracing of the initial

Agreement by which the client retained the appellant, due to indentations over the signature on the Agreement, which indentations almost matched the signature on the first release. Appellant denied any such tracing and stated that the indentations could have been produced when medical authorities were signed at the first meeting with the client, or at the times the client was in his office to sign other documents, or when she in fact signed the release in question. The appellant also referred the Court to examine several of the checks and other signatures to see that at times the client's signatures made at different times almost completely overlaid. It was noted that the Stipulation for Dismissal in the second settlement had indentations on the second and third copies from the signature on the top copy when signed. When these two cases were settled, the appellant deducted fees on collateral matters for the client, plus the case expenses and attorneys fees which left approximately $93.60 at the time of the first $750.00 settlement, and which the appellant testified that the client told him to keep for future services that she would be asking of the appellant. On the second $750.00 settlement, $25.00 was left after deduction of fees on collateral matters, plus case expenses and attorney's fee, and which the client told him again to keep for future services. The Supreme Court of Missouri in its opinion found that the appellant had commingled these $180.60 and ordered him disbarred. The time that these disputed documents were signed, the client was under psychiatric care and taking Valium and several other drugs to the extent that she testified that the Valium would cause her to sleep and further that she could not remember signing a completion form in November of 1974 for remodeling work on her basement when the work was only partially done, which the contractor then gave to the bank for the note she had previously signed to pay for this work which completion form was signed in the same month as the second settlement. The appellant testified that he first became aware of the client's mental and physical problems after the client's complaint was filed. The Master stated the testimony of the handwriting expert as to the

tracing was especially impressive. Nevertheless, even an expert can be wrong about some things. The Supreme Court of Missouri recited the first of the two sentences directly above this, however, it failed to include the second sentence, which immediately followed in the Master's report. The Master found that the appellant did keep the client informed as to his actions and had her consent to make the settlements that were made. The Master further found that the client was unpredictable, uncooperative, evasive and her health led to taking medication that affected her judgment and activities, that her testimony was vague, contradictory, confusing and lacked believability and that she failed to disclose all facts and circumstances. The Master recommended that the appellant receive a public reprimand for the manner in which this case was handled in his office, and that his license should not be taken from him or suspended.

The only Count of the seven Counts which involves commingling is Count IV. The Master found that the proof on this Count was not sufficient to be considered. The Supreme Court of Missouri in its opinion did not specify which one or more of the seven Counts against the appellant was found to be true. The opinion states only that appellant violated Supreme Court Rule 4, DR 1-102(A)(1) and (5), 9-102(A), 9-102(B)(1), (3) and (4). As stated by the Master, the proof of this Count was not sufficient to be considered. In the Information, there was no Count charging the appellant with commingling the net settlement proceeds from the second settlement, and which the appellant set out in his Brief to the Supreme Court of Missouri, so that such a violation, if any, was not before the Court. The only Count of commingling before the Supreme Court of Missouri was Count IV, which the Information (App. 77) allegedly involved the settlement of a pending lawsuit, however, said lawsuit had been dismissed a year previously to the settlement which dismissal was testified to at the Hearing before the Master and Bar Committee. Further, the client testified that he had no

money to pay for her services on collateral matters, and that on one collateral matter in particular, she was going to pay the appellant money from the first claim. The appellant testified that the net settlement proceeds were retained at the request of the client for future services, that she would be requesting, so that the character of the proceeds became retainer proceeds, which according to Rule 4, DR 9-102(A), Missouri Supreme Court rules, need not be deposited in a trust account. However, the Supreme Court of Missouri's opinion does not mention at all, that the appellant maintained these funds as retainer proceeds.

The appellant was to be tried on the basis of the charges set out in the Information filed in accordance with Rule 5.15, Supreme Court of Missouri. The trial was to be conducted in accordance with Rule 5.18, Supreme Court of Missouri. The appellant challenges both of these Rules as prejudicing his constitutional rights which are guaranteed and protected by the Fourteenth Amendment, Section 1. The Supreme Court of Missouri appointed a Master in accordance with Rule 68.03, Supreme Court of Missouri (App. 90), and the Master found for the appellant on all Seven Counts, and recommended a public reprimand for the manner in which this case was handled in appellant's office. The appellant by the Findings and Recommendations believed that the Supreme Court of Missouri would follow the Master's report, or as Rule 68.03, Supreme Court of Missouri, provides for judicial review to be as in suits of equitable nature, with regard given to the opportunity of the Master to have viewed and judged the credibility of the witnesses and the weight to be given the evidence. The Supreme Court of Missouri in its opinion did not analogize its position or findings over those of the Master. From the cold record, the Supreme Court of Missouri made its own and totally different findings as to credibility, weight, and value of the evidence and all factual issues that it believed necessary for the decision. The appellant in his Answer (App. 88), after denying the seven charges set out therein, then challenged the veracity of the

client. The Master in his report found that the client's testimony was vague, contradictory, confusing and lack believability. However, the Supreme Court of Missouri failed to mention this challenge of the client's veracity anywhere in its opinion.

The appellant was not required to file a Motion for a Rehearing and could have appealed to this Court directly from the opinion and judgment of the Supreme Court of Missouri. The appellant's Motion for a Rehearing (App. 33) was filed on the premise that the Supreme Court of Missouri would correct its errors, and find the appellant to be not guilty of the charge of commingling, or any of the other six charges. The appellant pointed out to the Supreme Court of Missouri that even if the appellant were guilty, the punishment was too harsh and shocked the conscious and denied the appellant that fundamental fairness which is required by the Due Process Clause of the Fourteenth Amendment; that the appellant was being found guilty of a charge not specifically set out in the Information, which denies him Due Process of Law in violation of Rule 5.15, Supreme Court of Missouri and the Fourteenth Amendment; that by the substantial evidence the appellant was not guilty of commingling, since these funds had changed in character to retainer proceeds; that the Supreme Court of Missouri was violating its own decision by ignoring the Findings and Recommendations of the Master; and that the opinion of the Supreme Court of Missouri contained biased and prejudiced statements out of context which were totally different from that contained in the reocrd. The Supreme Court of Missouri summarily overruled the appellant's Motion for a Rehearing on June 8, 1981 without comment of any kind.

The appellant on June 11, 1981 filed his Motion to Rescind the Present Mandate and Motion to Stay Issuance of Mandate (App. 67), which was granted on June 15, 1981. In appellant's Motion to Stay, he raised the constitutional question of Rule 5, Supreme Court of Missouri, as not providing a fair and just hearing, so as to deny him Due Process of Law and that other

professions were treated differently so as to deny him Equal Protection of the law so as to prejudice him in violation of Fourteenth Amendment; that he was found guilty of a charge in Court IV that was patently defective and which he was not specifically set out in the Information and of an alleged violation not even contained in the Information, which denied him a fair and just hearing and violated his right to Due Process and Equal Protection of the Laws, so as to prejudice him in violation of the Fourteenth Amendment; that he was found guilty of commingling by the Supreme Court of Missouri ignoring the credible evidence that these proceeds change character and became retainer proceeds, so that the appellant did not commingle any funds, so as to deny him a fair and just hearing and to deny him Due Process of Law, so as to prejudice him in violation of the Fourteenth Amendment; and that the Supreme Court of Missouri in its opinion has misstated parts of the evidence on the record and the findings and recommendations of the Master, which were biased and have greatly prejudiced the appellant and have denied him a fair and just trial and denied him Due Process of Law in violation of the Fourteenth Amendment. The Supreme Court of Missouri granted appellant's Motion without comment on the issues raised therein; and the judgment was stayed pending proceedings in this Court.

The appellant has contacted the Office of the Missouri Attorney General, and has been advised that the Supreme Court of Missouri has not certified to the Missouri Attorney General the fact that the constitutionality of Rule 5, Rule 5.15 and Rule 5.18, Supreme Court of Missouri were drawn into question by the appellant, in accordance with Rule 28.4(c) of this Court.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1. The Due Process Clause Of The Fourteenth Amendment, Section 1 Does Not Permit A State To Establish A Procedure For The Disciplining Of Attorneys (Such As Rule 5.18, Supreme Court Of Missouri), Whereby The Highest Court Of A State Establishes A Court Rule Whereby It Retains To Itself The Right To Hear The Cause Whereby It Would See And Hear The Witnesses And Judge The Credibility, Weight, And Value Of The Evidence And Factual Issues Necessary For The Decision, And Also For The State's Highest Court To Have The Right To Appoint A Master To Hear The Cause And Make A Report To The State's Highest Court Of Such A Hearing To Include Findings Of Fact And Conclusions Of Law, Only To Have The State's Highest Court Review The Case De Novo On The Record Only, And Then Determining The Credibility, Weight, And Value Of The Evidence And All Factual Issues Necessary For The Decision, Where The Master Finds For The Attorney On The Charges, And The State's Highest Court Finds The Attorney Guilty Of One Or More Of The Charges And Disciplines The Attorney, And That The Attorney Has Been Prejudiced By This Procedure.

The fundamental purpose of any judicial hearing is to arrive at the truth. Unless this is done, justice cannot be served and an accused attorney is prejudiced.

Missouri and most of the other States in their procedure for the disciplining of attorneys have the highest court in the State try the attorney in a trial de novo on the record. Rule 5.18, Supreme Court of Missouri is typical of the type of hearing granted. The appellant does not challenge these procedures, if the reviewing court either follows the Findings and Conclusions of Law of the trier of fact or where the reviewing Court reduces the sanction imposed by the trier of fact. However, where the reviewing court finds an attorney guilty of a charge where the trier of fact found the attorney not guilty of a charge where the

trier of fact found the attorney not guilty or imposes a greater sanction than that of the trier of fact, the attorney has been greatly prejudiced and denied a fair and just trial in violation of his rights under the Due Process Clause. In a trial de novo on the record, the reviewing court does not have the benefit of viewing the witnesses as they testified, and observe their attitude and demeanor, which the trier of fact based his findings and conclusions upon in large part. This defect in such a trial has been universally recognized by every court. The Supreme Court of Missouri has stated this position in upholding the finding and conclusions of the Master in disciplinary matters many times. *In re Parkinson,* 128 S.W.2d 1023, 1039 (En banc 1939), *In re Gamblin,* 458 S.W.2d 321, 323 (en banc 1970). The Supreme Court of Missouri has in fact criticized a Commission (former name of Master) who read the transcript of the Bar Committee hearing, rather than hold an evidenciary hearing in *In re Woodard,* 300 S.W.2d 385, 387 (en banc 1957), where it stated:

> "the necessary effect of stipulating that he (the Commissioner) should hear no oral testimony, but should determine the matters upon the evidence heard by the Committee, deprives this court entirely of the benefits of the impressions, views and findings of the Commissioner on the credibility of the witnesses, as based upon their appearances and conduct. In such a case, the Commissioner is in no better position to judge credibility than we are now. Generally speaking, that practice is not to be encouraged."

The Supreme Court of Missouri was well aware of the fact that a review of the cold written record by the Commissioner did not allow for a fair and just hearing. For if the trier merely reviews the record de novo, the trier is deprived of all of the observations of the witnesses to arrive at the truth, which is necessary to provide a fair and just trial, which was not provided the appellant so as to prejudice him and prejudice him of his fundamental right to a fair and just hearing and trial in violation of

his rights guaranteed and protected by the Fourteenth Amendment.

The Supreme Court of Missouri in the present case did not state any reason why it was not following the Findings and Recommendations of the Master. It merely stated its case law rule, not contained in either Rule 5.18 or 68.03, Supreme Court of Missouri, that, "In an attorney discipline case, it is our duty to review the case *de novo,* determining for ourselves the credibility, weight, and value of the evidence and all factual issues necessary for the decision" (App. 1). The action of the Supreme Court of Missouri in rejecting and failing to follow the findings and recommendations of the Master appointed by the Court, can only be characterized as being arbitrary, capricious and unreasonable, which prejudiced the appellant and deprived him of a fair and just hearing and trial in violation of his rights guaranteed and protected by the Due Process Clause of the Fourteenth Amendment. In this case the appellant challenged the veracity of his client who made the charges against him. The Master among other findings found the testimony of the client to be vague, contradictory and confusing and lacked believability. The Supreme Court of Missouri did not comment upon the lack of believability of the client in any manner, it merely took off on the appellant. The court first misquoted the conclusion and recommendation of the Master who had found the appellant not guilty of the charges, but recommended that the appellant "receive a public reprimand for the manner in which this case was handled in his office." (App. 32). Whereas, the Court stated, "The Master found respondent guilty of professional misconduct but recommended only that appellant be given a public reprimand (App. 1). Further, the Court raised an issue not claimed by the client, the Bar Committee, or the Master, that the appellant was aware of the mental and physical problems of his client and that the appellant took advantage of these disabilities, however, the appellant testified at both the Bar Committee Hearing and before the Master that he first became aware of these problems after the complaint was filed. The

Court then placed a greater duty on the appellant in his dealings with the client. Further, the Court misstated the findings of the Master with regard to the handwriting expert by stating only a portion of his findings to give the impression that the Master followed the opinions of the handwriting expert, and that the Court failed to include the very next sentence which stated, "Nevertheless, even an expert can be wrong about somethings." (App. 29). The Master further found with regard to the handwriting expert, "He testified that Exhibits 17 and 18 were not the signatures of Doris Duckett. She testified that they were her signature" (App. 29). The attorney for the Bar Committee at the oral argument before the Supreme Court of Missouri conceeded this mistake of the handwriting expert. However, the Court made no comment upon it, nor does it appear that the court did anything but believe the opinions of the handwriting expert, although his foundation for comparing the client's signature was not compared to these two exhibits acknowledged as being genuine. The Court in another partial statement to enforce its findings and harsh punishment upon the appellant stated, "The February bank statement on which this deposit was shown also showed an overdraft on the account on February 12th". However, the Court failed to include the fact that at both the Bar Committee Hearing and before the Master, the appellant produced the debit statements from the bank that showed that the withdrawals were due to an I.R.S. tax levy, at a time that the appellant was in a dispute over an audit by the I.R.S. Without realizing it, the Court made a statement from the record which was as given by the client, yet was not true. The Court stated, "Mrs. Duckett is a widow, mother of nine, and a woman whose eyesight and hearing is failing and whose left side is partially paralyzed. On December 19, 1970, Mrs. Duckett's husband was killed in an accident involving a bus operated by the Bi-State Development Agency (Bi-State)." (App. 2). If the Court would have read all of the testimony, it would have discovered the following, or ignored it. First, the client had not lived with her husband for four years prior to his

death and during this time she had been living with another man, with whom she had her two youngest children and that she continued to live with this man until November of 1975. To classify her as a widow may be legally correct, but far from the results of her conduct. Second, she did not wear her eyeglasses when shown various documents. Third, she did not wear her hearing aid. Fourth, the client had been caught in so many inconsistencies or admitted misstatements, so that when she testified to her being paralyzed on the left side, she was not even asked to explain it, since from the observation of all present at the Hearing, it was obvious that she was not so paralyzed. Fifth, the client's husband fell on a bus on December 5, 1970 and broke a leg, that due to prior existing physical disabilities, his lungs filled up with fluid while being immobilized in traction on a hospital bed, so that he died from this condition, rather than being killed in an accident on a bus. No one of these misstatements in and of itself may be said to have prejudiced the appellant. However, due to these many gross misstatements on the trial de novo on the record, the appellant was prejudiced and did not receive a fair and just trial. At the least, these misstatements were the result of such a trial de novo on the record and illustrate the natural dangers that come from such a trial. At the worse, they illustrate the bias and prejudice of the court toward the appellant. The mere fact that a hearing by the highest court of a state on a case where it decides to not follow the trier of fact who found for the attorney, will require the time and effort of the court to hold such an evidenciary hearing, cannot outweigh the constitution right of the right of the attorney to a fair and just hearing, where the attorney's right to practice law is at stake.

Ths issue before the court is of great importance and effects the attorneys in at least forty-five of the fifty states. If judgment below stands, a lawyer in a disciplinary will not have the right to a fair and just trial and he will be prejudiced and denied Due Process of Law where the trier of fact finds for the attorney and

the highest court of a state on a trial de novo on the record finds against the attorney. The highest court in a state should be required to hold an evidenciary hearing in such a case, and this Court should so state to protect and guarantee a fair and just trial in accordance with the Due Process Clause. This Court should specifically find that rule 5.18, Supreme Court of Missouri, is unconstitutional in its present form, since it denied the appellant a fair and just trial and prejudiced him by denying him the right to Due Process of Law as guaranteed by the Fourteenth Amendment, and further find and order the opinion and judgment below reversed, and that the Findings and Recommendations of the Master be substituted in its place for the reason that the appellant has already been tried by the Supreme Court of Missouri, and an evidenciary hearing by the Supreme Court of Missouri would not provide a fair and just trial to the appellant, due to the manner that this case was treated by it, all as set out above.

2. The Fourteenth Amendment, Section 1 Does Not Permit The Highest Court Of A State To Discipline An Attorney For A Charge Not Contained In The Information, Or For A Charge Not Specifically Set Out In The Information, Or For A Charge Which Is Not Supported By The Preponderance Of The Evidence.

The Supreme court of Missouri in following its Rules 5.15 and 5.18, violated the appellant's rights to Due Process of Law and its own decisions by finding the appellant guilty of commingling the proceeds of the settlement of the Bi-State matter as charged in Count IV of the Information, which Count IV was patently defective; by finding the appellant guilty of commingling the proceeds of the settlement of the Reliable matter, which is a charge not contained in the Information; and by finding the appellant guilty of commingling any proceeds, since the Master found the charge was not sufficient to be considered, which was due to the fact that the record shows that the client testified at least on one collateral matter that the appellant was to be paid

from the proceeds of the Bi-State settlement and the appellant testified that these settlement proceeds were being retained for future services to be requested by the client, which the Supreme Court of Missouri did not even comment upon.

Rule 5.15, Supreme Court of Missouri, states that the charge in the Information . . . "shall be set forth in brief form the specific act or acts of misconduct charged . . ." Here the charge in Count IV was directed to the settlement of a lawsuit that had been settled over one year prior to the settlement. This Court in *In re Ruffalo,* 390 U.S. 544, 551 (1968), stated that the disciplinary hearing against a lawyer are quasi-criminal in nature, and the charge must be known before the proceedings commence. In this case, the specific charge was never made against the appellant, even though the appellant pointed out this defect in his Brief to the Court, so that the Bar Committee could have in a Reply Brief or other pleadings requested leave to amend, which it did not do. Therefore, the appellant could not be found guilty of commingling in Count IV as set out in the Information and this Court should reverse the judgment below on this charge, and further find and order that Rules 5.15 and 5.18, Supreme Court of Missouri are unconstitutional, since they have in their use and application by the Supreme Court of Missouri been shown to violate the right to Due Process guaranteed to the appellant.

The Supreme Court of Missouri in its application of its Rules 5.15 and 5.18 found the appellant guilty of commingling the proceeds of the Reliable settlement, however, this charge is not contained in any of the seven charges of the Information. The appellant pointed out this defect in his Brief to the Court, so that as with Count IV mentioned above, the Bar Committee could have in a Reply Brief or other pleading requested leave to amend, which it did not do. Therefore, the appellant could not be found guilty of commingling of a matter not charged in the Information. The Supreme Court of Missouri itself has so held in Matters of Alpers, 574 S.W.2d 427, 429 (en banc 1978).

This issue before the Court is of great importance. If the judgment below stands, attorneys could be disciplined on charges of which they have never been charged. The Court should reverse the judgment below on this charge not contained in the Information and further find and order Rules 5.15 and 5.18, Supreme Court of Missouri are unconstitutional, since they have in their use and application by the Supreme Court of Missouri been shown to violate the right to Due Process guaranteed to the appellant. This Court in *Rabe* v. *Washington*, 405 U.S. 313, 315 (1972), which was a criminal matter, however, the principal stated therein should apply here, that:

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which it was never tried as well as it would be to convict upon a charge that was never made."

The Supreme Court of Missouri in its application of its Rules 5.15 and 5.187 found the appellant guilty of commingling, when the substantial evidence on the record indicates that these proceeds were in fact retainer proceeds, which by Rule 4 9-102(A), Supreme Court of Missouri, were not required to be in a trust account, however, the Supreme Court of Missouri ignored or failed to read this part of the record and did not mention this in any manner in its opinion. Although the Master stated that the proof of this count (commingling in Count IV) was not sufficient to be considered. Since the Supreme Court of Missouri totally ignored this substantial evidence, that if considered could have been sufficient to find that there was no commingling, the appellant did not have a fair and just trial, which has prejudiced him and has denied the appellant Due Process of Law. This issue is of great importance. If judgment below stands, an attorney will have no guarantee to a fair and just trial. Therefore, this Court should reverse the judgment below for the above reasons, and further find and order Rules 5.15 and 5.18, Supreme Court of Missouri as applied by the court to be unconstitutional.

3. The Punishment Imposed Upon The Appellant In Accordance With Rule 5.18 Supreme Court Of Missouri Is Too Harsh, Denies Him Due Process Of Law And Amounts To Cruel And Unusual Punishment, In Violation Of The Fourteenth Amendment, Section 1.

The appellant in his Appendix 1 (App. 48) to his Motion for a Rehearing set out numerous cases within the past five years, where an attorney was disciplined for commingling. In no case was the punishment as harsh as that imposed upon the appellant for allegedly commingling $118.60. The punishment imposed upon the appellant is unwarranted and is so severe and extreme as to shock the conscience and denies him that fundamental fairness which is required by the Due Process Clause. Cf. Rochin v. California, 342 U.S. 165 (1952). This punishment is also so severe and extreme as to amount to cruel and unusual punishment in violation of the rights provided by the Fourteenth Amendment.

This issue is of great importance. If judgment below stands, an attorney could be disbarred for the least infraction of the rules of professional conduct. Justice Jackson in a disent to disbarment stated in Re: Disbarment of Isserman, 345 U.S. 286, 294 (1954),

> "If the purpose of disciplinary proceedings be correction of the delinquent, the courts defeat that purpose by ruining him whom they would reform."

This disbaring was set aside upon a rehearing. 348 U.S. 1 (1954). This Court should reverse the judgment below and further find and order Rule 5.18, Supreme Court of Missouri, as applied by the Court to be unconstitutional.

4. The Fourteenth Amendment, Section 1 Does Not Permit A State To Establish One Set Of Procedures For The Disciplining Of All Professional, Except Attorney And A Different Set Of Procedures For The Disciplining Of Attorneys.

Rule 5 and in particular Rule 5.18, Supreme Court of Missouri establishes the procedure for the disciplining of attorneys. All other professions in the State of Missouri have discipline procedures governed within the Omnibus State Organization Act of 1974, which is located in Volume 34 VAMS, Chapter 26, Appendix B, Section 4, with all hearings to be conducted in accordance with Chapter 536, VAMS, Model State Administrative Procedure Act, which provides for an aggrieved professional person to appeal from the administrative finder of fact for a judicial review. The Supreme Court of Missouri has on numerous occassions held that it is bound by Section 536.140 VAMS on the scope of judicial review set out therein, which restricts the court's review and in particular leaves credibility to trier of fact and give due weight to the opportunity of the trier of fact to observe the witnesses, and to the expertness and experience of the trier of fact. However, an attorney is totally judged on all issues including credibility on the cold written record.

There is no just or reasonable purpose served by having two different procedures for the disciplining of professionals. Rule 5.18, Supreme Court of Missouri is arbitrary, capricious and unreasonable and deprives an attorney of Due Process of Law and also Equal Protection of the Laws in violation of the Fourteenth Amendment. The Supreme Court of Missouri selects and appoints the Master. The court then on selected cases such as the appellant ignores the Master, or as in other cases states that it is best for it to follow the Master. In re Parkinson, *supra* and In re Gamblen, *supra*. From the record of the Supreme Court of Missouri, it has used what it calls its discretion under its Rule 5.18 to suit its purpose in a particular case, which is contrary to other cases.

This issue before the Court is of great importance. If the judgment below stand, lawyers will continue to be treated differently than other professions in disciplinary proceedings and more important than the difference is the present manner that this difference is exercised in an arbitrary, capricious and unreasonable manner to the prejudice of the attorney, in violation of the Due Process Clause of the Fourteenth Amendment. This Court should reverse the judgment below with an order that either the findings and recommendations of the Master be substituted therein, or order that appellant is not to be tried at an evidenciary hearing due to double jeopardy and the bias and prejudice of the court to the appellant, and further find and order Rule 5.18, Supreme Court of Missouri to be unconstitutional due to the manner that the Court applied it to the appellant, and that the Supreme Court of Missouri be further ordered to develop a disciplinary procedure for attorneys to conform to the procedures in all other professions.

5. For the above reasons, the issues presented are so substantial as to require plenary consideration with briefs and oral argument, ~~agreement~~, for their resolution. The issues here are new cosntitutional problems that this Court has not ruled upon, or are so important to every attorney in all of the states for this Court to consider and resolve.

CONCLUSION

The Court should accept jurisdiction and hear the case on its merits.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion Below

SUPREME COURT OF MISSOURI
en banc
May 11, 1981
No. 61379

In Re: Donald M. Witte,
Respondent

This is a disciplinary proceeding originally instituted by the Bar Committee of the Twenty First Judicial Circuit against Donald M. Witte, a practicing attorney in St. Louis, Missouri. The Bar Committee found there was probable cause to believe that respondent was guilty of professional misconduct and caused an information to be issued charging respondent with making two settlements on behalf of his client Doris Duckett without her knowledge or consent, with comingling the proceeds of the two settlements with his own funds for his own use and benefit, and with forging or tracing of the client's signatures on settlement and release papers in both cases, all in violation of DRs 1-102(A)(1), (3), (4), (5), (6), 7-101(A)(2), (3), 7-102(A)(8), 9-102(A), 9-102(B)(1), (3), and (4) as contained in Rule 4. The Honorable Marshall Craig was appointed as a Special Master to hear evidence and make findings of fact, conclusions of law, and recommendations. The master found respondent guilty of professional misconduct but recommended only that respondent be given a public reprimand. In an attorney discipline case, it is our duty to review the case *de novo,* determining for ourselves the credibility, weight, and value of the evidence and all factual issues necessary for the decision. In re Pine, 576 S.W.2d 538, 539 (Mo. banc 1979); In re Schiff, 542 S.W.2d 771, 774 (Mo. banc 1976). We hold that respondent should be disbarred.

Mrs. Duckett is a widow, mother of nine, and a woman whose eyesight and hearing is failing and whose left side is partially paralyzed. On December 19, 1970, Mrs. Duckett's husband was killed in an accident involving a bus operated by the Bi-State Development Agency (Bi-State). Respondent was employed by Mrs. Duckett on a contingent fee basis to recover against Bi-State for the wrongful death of her husband and during the course of the original employment was also employed to recover $1,000 double indemnity allegedly due from the Reliable Insurance Company (Reliable). Respondent also claims to have handled collateral matters for Mrs. Duckett during the course of these employments. The suits against Bi-State and Reliable were settled by respondent, the settlement in each case being in the amount of $750. Mrs. Duckett stated that she had never authorized either settlement, that she had not seen the settlement papers in either case and that she had not signed releases or stipulations or endorsed drafts in either case, all of which was denied by respondent.

At the hearing before the master, a substantial part of the testimony was devoted to "trying" Doris Duckett. The master found "that from the time of the establishment of the client-attorney relationship, the respondent had a very difficult client. She was unpredictable, uncooperative, evasive and her health led to taking medication that affected her judgment and activities. Her testimony was vague, contradictory, confusing and lacked believability." The record shows that Mrs. Duckett was undergoing a variety of physical and emotional stresses during this period, and that she was taking several kinds of drugs, including large quantities of Valium. She testified that her reactions to some of the medications ranged from virtual unconsciousness to staggering and passing out; and, that if she was not medicated she became so "nervous" that she simply could not function.

The master found the testimony of the handwriting expert, William H. Storer, to be credible, and that the expert's

testimony "as to tracing was especially impressive." The photographic transparencies or overlays of the signatures on the settlement checks prepared by the expert and presented to the Court as exhibits left little to the imagination of even the casual observer.

The testimony is undisputed that respondent deposited the proceeds of both settlements into his office or personal bank accounts, that his client's money was commingled with his own funds, and that he declared such sums less expenses incurred as his income for income tax purposes. The remainder of all funds in these accounts were withdrawn and used by respondent for his personal use. No part of the proceeds of the settlements were delivered to the client, Doris Duckett, until a member of her family asked attorney Littleton to call and inquire of respondent as to the status of the two cases.

The master apparently viewed respondent's sick and troubled client as the excuse for his conduct. We view this testimony in a different light. For every degree that respondent by his testimony and evidence proved a less than normal mental and functional capacity on the part of his client, Doris Duckett, he raised by an equivalent degree the standard of conduct which this Court must require of him in his dealings with his client.

This Court has on two prior occasions held the commingling of client monies by a lawyer to be grounds for disbarment or suspension. In the case of In re Robinson, 519 S.W.2d 1 (Mo. banc 1975), the client deposited $1200 with the lawyer to pay a claim. Instead of paying the claim, the lawyer commingled the funds with his own money and used the funds for his personal ends. We held disbarment an appropriate punishment. The case of In re Houtchens, 555 S.W.2d 24 (Mo. banc 1977) was based on several charges of commingling clients' funds. Count II, much like the instant case, involved a $4,000 settlement draft being delivered to the attorney who gave the company a release. Neither the release nor draft was signed by the client. The

lawyer deposited the draft in his personal account. We stated, "Misconduct, such as that which respondent is charged, is totally incompatible with the ethical standards of the legal profession; and, absent some very persuasive and acceptable mitigating factor, disbarment is the proper answer." 555 S.W.2d at 26. The *Houtchens* court found the lawyer to be suffering from some psychological problems and considered this to be a mitigating factor justifying only a three year suspension rather than disbarment.

Other jurisdictions have made similar rulings on disciplinary matters. Ohio stated that the rule against commingling funds " 'was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money.' " Columbus Bar Association v. Tuttle, 41 Ohio St. 2d 183, ____, 324 N.E.2d 753, 754 (1975), *quoting,* Clark v. State Bar of California, 39 Cal.2d 161, 168, 246 P.2d 1, 5 (1952). *See also* Peck v. State Bar of California, 217 Cal. 47, 51, 17 P.2d 112, 114 (1932).

In the case of In re Fields, 36 App. Div. 2d 277, 319 N.Y.S.2d 993 (1st Dept. 1971), the lawyer was found to have commingled and converted a client's funds, settled a claim without the client's consent or knowledge and forged his client's name to a petition and other documents. The court held, "The respondent has been guilty of professional misconduct of the type which demonstrates his unfitness to continue as a member of the Bar." 36 App. Div. at ____, 319 N.Y.S.2d at 994. When that court was confronted with a lawyer who had commingled, used and converted trust funds, the court stated:

> Respondent's conduct reflects complete indifference to the responsibilities and obligations owed by a lawyer to clients, particularly in respect to trust funds. In mitigation, respondent pleaded...the illness of his wife and his unrealized expectation of receipt of funds to make good

> his defalcations....He has demonstrated a lack of capacity to fulfill the duties of the office of attorney and counselor and merits the severest discipline.

In re Poller, 35 App. Div. 2d 156, ____, 314 N.Y.S.2d 843, 844 (1st Dept. 1970).

The commingling of the client's funds is admitted, except for the explanation offered by respondent that he kept the funds at the request of the client, which she always denied, and his further explanation that he secured the client's funds by writing a notation and putting it in his safe with some commemorative coins, in which notation he stated that the coins should serve as security for what he owed Mrs. Duckett from the settlements. Our prior cases having recognized disbarment as an appropriate punishment for the commingling of clients' funds with those of the attorney, all that remains to be done is to examine the evidence to determine whether there are mitigating circumstances either justifying or explaining the conduct of respondent and warranting lesser punishment.

In this respect, we judge the matter primarily on the testimony of the respondent himself. Respondent's testimony for the most part is uninterrupted narrative, and does not lend itself to either paraphrasing or summary. It will therefore be necessary to set forth a considerable amount of respondent's testimony verbatim.

Respondent frequently refreshed his memory from his office files and records. These records were devoid of either time records to support and justify the amount of other work allegedly done for the client or copies of correspondence which would prove notice to the client of the settlements and also prove transmittal to the client of drafts, releases, and stipulations for her signature. Respondent explained that his time records were informally kept, periodically noted, probably on yellow pad sheets, and that most correspondence had been "culled" from the files at the time of closing.

With reference to the Bi-State settlement, respondent testified:

> He [the opposing lawyer] mailed me — correction. He either mailed me or I picked up the release and/or draft at the same time, and I am not sure about that, and I cannot recall how these documents were in fact signed. My normal office procedure is to immediately telephone the client and ask them to come into the office to sign, or if I mailed them to her with the return envelope back to me or if I went by her house and dropped them off or if, in fact, she signed them in front of me. I cannot recall. It's my recollection, however, that she knew of the settlement, she agreed of [sic] the settlement, and that the signing of the documents was handled in what I would call a normal routine of my office, and due to the small amount of this settlement, that is, $750.00, possibly some of the formalities that I would normally use in a larger settlement were not used at that time. After the documents were signed, that is, the release and the draft from Bi-State, Mrs. Duckett advised me that she did not wish to have the proceeds paid out to her at that time.

By reconstructing from memory "other work allegedly done" and "time spent on work", respondent concluded that at the time he probably owed his client, Doris Duckett, $93.60. He also said that "in the Bi-State case, I got both releases and draft at the same time" and then continued:

> At that time I also told her that I did not wish to keep these net proceeds in my escrow account and that I would place them in a different account in some other type of bookkeeping. I don't believe I explained to her exactly what I was going to do; however, what I in fact did was to cash the entire settlement draft and reissue a check from my escrow account to my business account in the amount of seven hundred dollars [$750]. At that time I executed by

writing on legal paper what I would call a note evidencing an obligation to Doris Duckett, which I believe I in essence made a rough settlement statement, showing the starting of seven fifty, the deductions for the case itself, and the deducations for the collateral matters that I had performed services for, showing at that time — and this figure I am not aware — I can't say with certainty is correct. It is my reconstruction figure of $93.60. Not wishing to have to keep track of this money, I referred to the note that the collateral which was to be used to pay Mrs. Duckett in the event I was not around for some reason was a coin collection that I had purchased from the Franklin Mint, which were coins about the size of a silver dollar or slightly larger of a higher quality silver which sold for approximately twenty dollars apiece of all of the presidents of which I believe there were thirty-two or thirty-three at that time. Further to evidence the fact that the money could be obtained from these coins without any great trouble, they were purchased initially between 1970 and 1973 with a guarantee by American Press, who sold these coins, that within five years of the final purchase they would immediately refund the total price if anybody asked for it, due to the raising price of silver at that time, so that in my opinion there was more than enough collateral at any time to pay the amount actually due Doris Duckett.

With reference to the [illegible] State settlement, respondent first testified he mailed the papers to Doris Duckett. When the exhibits showed that they had not been folded, he said that he probably had taken them by the client's house. Respondent's explanation of the lack of punch holes on these papers was because they were just shoved in the file at the time of closing.

Testifying regarding the Reliable Insurance Company case, respondent stated:

Once again I have no direct recollection, due to the amount of time involved since this thing happened, as to how this execution of these documents was actually performed; however, I am sure that as soon as the document came in, either I or my secretary telephoned Mrs. Duckett they were here and requested her to come and sign them, or they were mailed out or I would have taken them by her house, but I have no direct recollection as to how that was done. My only recollection is that she did agree. She was advised of the settlement. She agreed to the settlement, and when those documents were presented to me by either being mailed back or by my secretary, by my cursory looking at them, they looked to me as if they were the signatures of Doris Duckett, and I notarized the release itself. I signed the stipulation and I put the draft in for collection. That is on the Reliable case.

Once again Mrs. Duckett advised me that due to the continual problem she was having with Mrs. Scott, her sister, and her daughter, that she wished that I would keep the net that she was due from this settlement in addition to the prior settlement with Bi-State. After I deducted all of my fees and services on other matters, which would have been the neighborhood fight, which was three hours at forty dollars an hour or a hundred and twenty dollars, defending the declaratory judgment action, which I know I spent more than three hours, but I have down here three hours at thirty-five dollars an hour or a hundred and five dollars, and she had also telephoned me about a problem with her basement, which I spent, I believe, four hours on for a hundred and forty dollars, so those were $365.00 in deductions for other matters. I deducted the court costs of sixty dollars and attorney's fees of three hundred for $360.00, making the net payable to her after all deductions of some $250.00, [$25] and adding that to the $93.60 or thereabout which I was holding, meant that I had $118.60 of her money which she wanted me to retain on her behalf, which I did unfortunately.

On cross and redirect examination, respondent also added the following:

Q And did you then report that entire $750.00 as income on your income tax?

A I would say that I did.

Q Why did you not use your escrow account for that check as you did the previous check?

A Well, it is one of those things, pragmatic use, the fact that she had already declared to me I could have all the money. I told her what I had done before and I set up a separate account for the money I owed her from Bi-State. I saw no reason to reissue a check back to myself.

Q Did you put another note in the file as to how much you owed her out of the Reliable settlement?

A No, because the original note had a remark that I would be able to subtract other services performed, and I looked upon it and put a note in the Reliable file that was about — whatever figure it was, twenty-five, was still due from that to pay off the encumbrance to Mrs. Duckett, so it was, call it, a book procedure.

Q You did put a note in the Reliable file indicating that you owed her twenty-five dollars?

A Right, I made up what I would call a — where are 17 and 18 [the settlement statements respondent prepared almost 2 years later when he paid Mrs. Duckett] — a rough settlement statement showing what was there, showing what I had done since the closing of the Bi-State file and roughly showing that she was due twenty-five dollars.

Q And you put that in —

A Reliable file.

Q Reliable file, and did you note on there that that amount was secured by the coin collection also?

A Yes, words to that effect, or I don't know if I said the coin collection, but was to be added to the note in the Bi-State file or words to that effect. I don't know which.

Q And Mrs. Duckett never got a copy of this note that went into the Reliable file?

A She did not.

Q And she never got any bills for any of the amounts that you were charging against her?

A She did not.

Respondent testified with reference to both settlements that his secretary used his form book to write letters sending out settlement papers. The form letters all said "sign by the red check marks." There were no red check marks on any of the releases or the draft. Respondent's explanation of this was that he guessed he probably hadn't used the form letters, but had just called her and stuffed them in an envelope — that "for the reason that due to the relationship I built up with Mrs. Duckett it is very — well, I could have just told her, 'Sign these things and send them back'." It is interesting to note that the interrogatories which were definitely mailed out for signature did have a "check mark" at the signature line.

The evidence showed that the Reliable settlement check was dated January 30th and deposited to respondent's general account February 1st. Respondent testified that it could have been mailed to him, or picked up by him, mailed to Mrs. Duckett and remailed by Mrs. Duckett, or brought to the office by her, or

taken or picked up at the house by him, all within the two day framework. This release was not dated but was notarized by respondent who did not know whether he saw it signed by Mrs. Duckett. The February bank statement on which this deposit was shown also showed an overdraft on the account on February 12th.

With reference to the telephone call from Attorney Littleton and subsequent settlement which respondent did make with Doris Duckett, the respondent stated:

> He [Littleton] stated that the daughters had introduced him to Mrs. Duckett and that he had inquired into the status of her case, and at this stage he asked if he could call me or she asked him, and I am not sure at this point. In any case, he telephoned me and it is my recollection that I received a telephone memo message from my secretary, either being on another call or coming in and that message being there, and I returned the phone call without paying attention to the number. I don't know if in fact I called his office or I called Mrs. Duckett's home, but in any case, I was on the phone about five minutes at the most with him, at which time I advised him that the case was settled. He only inquired about the Bi-State case, and I advised him as to the amount of the settlement and why it was settled for that amount, that is, due to the liability, which I am sure he passed on to Mrs. Duckett at that time if he was at her home at that time or later passed it on. After getting off the phone with Mr. Littleton, I pondered the matter for a while and I would say maybe an hour or so later, later in the day, I telephoned Mrs. Duckett inquiring as to why Mr. Littleton was telephoning me, and she said that she was greatly embarrassed over this and she only talked to Mr. Littleton at the insistence of her daughter, and she did not want Mr. Littleton to handle the matter in any way or to call me, but that her daughter insisted. At that time I told Mrs. Duckett that I had to disburse these proceeds to

her without any more delay so there was no problem that these matters were resolved and resolved to her satisfaction and asked her to come to my office. She stated that she would come out to my office; however, I did not hear from her for a while, and I would say that between March 10 and March 13th I telephoned her upon getting back to the office from court and told her she should come out to my office. She stated that she could not, and I asked her if I could come to her home, at which time she said yes. At that time in my mind I had no real idea of how many dollars I was actually going to pay out to Mrs. Duckett. At this particular time I was in an extremely good financial situation since I just had settled three separate personal injury lawsuits. That was going to turn out to be my best personal injury settlement month. I had received a jury verdict on February 22 in the sum of $25,000.00, which the insurance company had agreed to pay. I had a settlement over an acceptance of a matter in Paris, Missouri, of $17,500.00, and I had a settlement in a disfigurement case for $15,000.00. These were a total of $25,830.00 in fees on these three cases alone. In addition I had other, you might call it, income from my other general practice during that month which had been coming in, so that when I went to her house, I had the intention of waiving some or all of the fees that I had intially charged against her towards these settlements, and in effect, when I got to her house, I advised her that I had some, you might say, financial good luck, and that I was in fact going to waive all of the fees on collateral matters, and at that time began to draw up the settlement statements in front of her from blank legal pads, writing matters down in front of her and explaining each and every matter to her as it was written [exhibits 17 and 18]. I had in my mind paying her roughly eight hundred dollars, and I might say, juggled the figures to arrive at that amount, and in fact, I did not charge the court costs on one of the cases that I should have charged, I believe,

on the Bi-State matter, so that I could come up with the dollars or in the area of eight hundred dollars. It appeared to me at that time that she understood everything that I wrote down, and it is my practice for a number of reasons to write these in with a carbon copy and to give the client a copy of it and explaining to them that this money is not taxable and to keep this settlement statement so that if IRS should ever ask where did this four hundred and five hundred ninety dollar check come from, she could substantiate that with them in the fact that it was not income. After filling out each one separately, I had her sign the first form, tearing off, if my recollection would be correct, and giving her a copy, and then filled out the second form. At this time I cannot actually recall filling out either the Bi-State first or the Reliable Life Insurance Company settlement statement first. However, in any instance, there was never any question by Mrs. Duckett at this time as to, first, where did this Reliance Life Insurance Company case come from; second of all, I never signed any releases, drafts, stipulations, because this woman was fully aware and knowledgeable of the fact of all the matters that I have previously testified to concerning these matters. It is my recollection and I went back to my office and dictated the settlement checks and that they were prepared in the normal routine of dictation. However, one of them — and I don't know for what reason — seemed to be wrong, so I tore it up, but I sent the first one out immediately. I don't know why, if I did not redictate the second check, but about a week went by and I came across the file again and I immediately, without dictating on it, wrote the Reliable check for three ninety-five in longhand and immediately mailed it to her, and I would say these were mailed out not later than the date on each one of the checks. Upon receiving my bank statement around the 5th of April, I noticed that neither one of these two checks had been cashed. I was fully aware that the neighborhood in which Mrs. Duckett

lives has a high crime rate, and due to the fact that she told me she had lost money previously to her sister, who had taken some of her checks from her, I wrote to her a letter on April 9, 1976, which was on a Thursday, asking if she had received those checks. I don't seem to be able to find that. I know we had that at one time. My letter of April 9 [apparently the only letter not culled] to Mrs. Duckett read: On March 11, 1976, and March 18, 1976, I mailed two separate checks to your above address. Neither of these checks have been presented to my bank as of this date. Paragraph. If you have not received these checks, will you kindly contact me immediately or advise me as to why they have not been presented? Best wishes to you and your family, Very sincerely yours. On Tuesday, April 13th, 1976, Mrs. Duckett telephoned me at 11:10 a.m., according to a legal memo pad date that I made to myself on most telephone conversations [the only telephone note produced] that I received from clients. I filled it out at that time. She started off by complaining of problems, bone disease, nerves, seizures, hearing, no feeling of hot or cold, two heart attacks, cataracts on the eyes, high blood pressure, glaucoma clinic. Then told me about the man who had attacked her had gone to trial and he was to get life for robbery, assault with intent to kill. She stated she got the two checks but hasn't been able to get to the bank at Manufacturer's Bank.

The two settlement sheets (yellow pad sheets, exhibits 17 and 18) were undated, partially written in ink and part in ball point pen, raising at least a possible inference that they were not written at the same time.

The checks sent to Mrs. Duckett were two weeks apart. The Bi-State settlement check was typed, the Reliable settlement check was hand written. This was explained,

A I thought I stated that in my statement yesterday is that normally checks are typed up and I dictated those checks and somehow — I forgot which one right now — the one that was typed was typed from the typing and the other one was typed but it was in error somehow, and I tore it up and threw it away. I immediately sent her the one that was typed. I don't know if I redictated it and it didn't get typed. I realized, going through your files as you do, that there was something that hadn't been done on that file, and I immediately handwrote the second check and put it in the mail at that time.

Q Why didn't you just do the second check and send them both at the same time?

A Mr. Silverstein, we are creatures of habit. I like to do things in what I will call a neat manner. I just didn't do it. I would have preferred that the second check would have been typed also and it is not. I put it off. I sent the first check out and probably intended the second check, didn't get around to it and didn't get around to it and finally I wrote it out and sent it to her.

Q Wouldn't it have been neater to have sent both checks at the same time?

A I agree with you, sir. The only thing I can say: there was no pressure on me at that time to get the checks out at that time.

In explanation of his general conduct in this matter, respondent stated:

> but at all times doing things in a way that I always thought was right, doing things at time without following what we call the formalized procedures to make sure that you don't protect yourself against someone in the future. I believe

> that in this matter I did not follow the procedures that I probably should have taken. I believe in retrospect that my act was one of stupidity, that I over trusted a client, that I became too familliar, too close, and acted in what I will call almost a family matter without formality, rather than following all the formalities that should normally be required in a law office.

Mrs. Duckett denied that she had either seen or signed releases, stipulations or drafts. During the course of the hearing and on cross examination Mrs. Duckett said that two signatures, according to the expert traced or forged, "looked like her signature" or appeared to be her signature. Respondent denied that any of the signatures were forged or traced. No counter expert was called by respondent. Respondent relied solely on his own testimony to dispute the tracing and forgery charges. There was no physical, objective, or corroborative evidence of transmittal of settlement papers and drafts to the client, Doris Duckett. There is no disagreement regarding the thoroughness of the expert and the very impressive nature of his testimony. The photographic transparencies of the signatures prepared by the expert so that they could be overlayed for the purposes of examination are consistent with Mrs. Duckett's testimony that she neither authorized the settlements or signed the settlement papers. Usually, when the conduct charged against the lawyer is of such nature that it can be violative of both our Code of Professional Ethics and the statutes of the state of Missouri, § 570.090, RSMo 1978, (Forgery), the disciplinary action comes to us only after full disposition of the criminal aspects of the case in the courts.

On the basis of our review of respondent's explanation of his conduct, we are unable to find mitigating circumstances which justify lesser punishment. To the contrary, respondent's explanation of his conduct is fraught with shifting positions and inconsistencies.

Having found respondent guilty of commingling the funds of his client and that disbarment is the appropriate punishment, In re Houtchens, 555 S.W.2d 24 (Mo. banc 1977); In re Robinson, 519 S.W.2d 1 (Mo. banc 1975), we find it unnecessary that we make formal findings on the charge of forgery and tracing of the signatures on the settlement papers and drafts. Respondent has violated Supreme Court Rule 4, DR 1-102(A)(1), (5), 9-102(A), 9-102(B)(1), (3) and (4).

Respondent is ordered disbarred.

WARREN D. WELLIVER, Judge

Donnelly and Higgins, JJ., concur; Seiler, J., concurs in result; Morgan, J., concurs in part and dissents in part in separate opinion filed; Bardgett, C.J., and Welborn, Sp.J., concur in opinion concurring in part and dissenting in part of Morgan, J.; Rendlen, J., not sitting.

Opinion Concuring In Part
And Dissenting In Part

I agree that the record reflects that respondent, by negligence or otherwise, is guilty of "commingling" approximately $120 of his client's funds with those of his own; and, that for so doing, he has violated certain Disciplinary Rules and should be disciplined.

However, I respectfully suggest that the outright disbarment ordered in the principal opinion is exceedingly harsh and not mandated by the facts of this case. As pointed out therein, we do in a disciplinary case reserve unto ourselves the power to review the same *de novo* and limit the findings of the Master to recommendations only. Nevertheless, we should not disregard the same unless found to be totally erroneous. In this case, it was recommended that "respondent be given a public reprimand."

We note certain conclusions of the Master upon which his recommendation, heretofore noted, was based. (1) That respondent had a reputation as "a man of good moral character, trustworthy, honest and [his reputation] for truth and veracity was excellent." (2) That "it is clear that from the time of the establishment of the client-attorney relationship, the respondent had a very difficult client. She was unpredictable, uncooperative, evasive and her health led to taking medication that affected her judgment and activities. Her testimony was vague, contradictory, confusing and lacked believability. She failed to disclose all facts and circumstances." (3) "The evidence in this case is not substantial with reference to the testimony of the complaining witness. Without taking anything from the good faith and excellent work of the expert on questionable documents, his testimony is subject to careful scrutiny. His testimony is in direct conflict with the testimony of the respondent and in some instances is in conflict with the testimony of Doris Duckett." (4) "From all the evidence, it is

concluded that the respondent did keep Doris Duckett informed as to his actions and had her consent to make the settlements which were made. He acted very unwisely in not keeping better records and in not making settlements with her as to the settled claims. His office procedures in this case were not good. He appeared to be meticulous in most of his office work, but lax in other steps taken." (5) ". . . it appears that the conduct of the respondent was an isolated case. There is no showing of a line of misconduct by the respondent. His reputation appears to be excellent."

In the case of In re O'Brien, 478 S.W.2d 310, 312 (Mo. banc 1972), we said: "Undoubtedly there do remain instances where some compassion is called for—even to members of the legal profession."

If the reprimand suggested by the Master is not adequate, undoubtedly a suspension limited to one year would be.

J. P. MORGAN, Judge

APPENDIX B

Judgment Below

SUPREME COURT OF MISSOURI
en banc
May 11, 1981
No. 61379

In Re: Donald M. Witte,
Respondent

OPINION BY WELLIVER, J.

Now at this day, come the parties, by their respective attorneys, and the above entitled cause having been fully heard, briefed argued and submitted to the Court, and the Court now being sufficiently advised of and concerning the premises, doth order and adjudge that the said DONALD M. WITTE be, and he is hereby, disbarred from the practice of law and that his name be stricken from the roll of attorneys in this State.

(Opinion filed.)

APPENDIX C

Findings and Recommendations of Master, Marshall Craig

SUPREME COURT OF MISSOURI
en banc
April 28, 1980
No. 61379

In Re: Donald M. Witte,
Respondent

Accusations and charges were filed against the respondent herein, Donald M. Witte, with the Bar Committee for the Twenty-First Judicial Circuit. The charges involved alleged misconduct by the respondent in dealing with his client, Doris Duckett. Those charges concerned his settlement of claim the complaining party had against Bi-State Development agency; mis-handling of the settlement, changing various documents, failure to keep his client informed, and like charges with reference to settlement of her claim against Reliable Life Insurance Company. After due notice, a hearing was held by the committee which resulted in its findings that there was reasonable cause to believe that Respondent had committed professional misconduct as charged and there followed the filing of the information with the Supreme Court.

The information is in seven counts and, briefly stated, charges that the respondent (1) did agree and settle the matter of Doris Duckett, *et al.* v. Bi-State Development agency for the sum of $750.00 plus the payment of costs without the knowledge of and without the express or implied consent of his client; (2) placed or caused to be placed on various documents what purported to be the signature of his client, without her express or implied consent; (3) failed to inform his client of the

settlement of the Bi-State case; (4) failed to maintain a sufficient balance in his "Special Account" to cover the amount due his client; (5) agreed to settle and did settle the matter of Doris Duckett v. The Reliable Life Insurance Company for the sum of $750.00 without the knowledge and without the express or implied consent of his client; (6) placed or caused to be placed upon various documents what purported to be the signature of his client; and (7) failed to inform his client of the settlement of the matter of Doris Duckett v. The Reliable Life Insurance Company for $750.00. The information alleges that these actions by the respondent were in violation of the various sections of Supreme Court Rule 4.

Thereafter the Supreme Court en Banc appointed the undersigned as master to hear the case. Hearing on the matter was had with respondent present with his attorney at all times and the Committee was represented by counsel.

At the outset of these findings, the master wishes the record to show that all parties and the attorneys, Merle L. Silverstein, for the Committee, and Roger M. Hibbits, for the Respondent, were very cooperative and helpful and all times conducted themselves with an air of fairness and determination for findings based on the evidence.

The documents introduced which had the greatest bearing on the charges were: Exhibit 2, release of all claims in connection with the Bi-State Transit System suit, bearing the alleged signature of Doris Duckett; Exhibit 5, General Release in connection with The Reliable Life Insurance claim, bearing the alleged signature of Doris Duckett; Exhibit 4, Draft from Reliable Life Insurance Company, bearing the alleged endorsement of Doris Duckett; Exhibit 3, Draft from Beneficial insurance group, bearing the alleged endorsement of Doris Duckett; Exhibit 6, Stipulation for Dismissal as to Reliable Life Insurance Company bearing the alleged signature of Doris Duckett; Exhibits 7 through 16 being checks signed by Doris

Duckett; Exhibit 17, Settlement sheet bearing the alleged signature Doris Duckett as to Bi-State case; Exhibit 18, Settlement sheet as to Reliable Life, bearing the alleged signature of Doris Duckett; Exhibits 19 and 20, stubs from checks as to the two claims; Exhibit 21, Agreement (This exhibit was important in two ways, first it was the beginning of the relationship of client and attorney, and second was the genuine signature of Doris Duckett); Exhibit 22, communication sent to Tom Cunningham from Doris Duckett, with copies of checks attached; Exhibit 23, document presented on behalf of the handwriting expert; Exhibit 24, original of Exhibit 6 (Stipulation for Dismissal); Exhibits 26 through 33, exhibits from the handwriting expert as to signatures; Exhibit 34 A, and 34 B, exhibits of handwriting expert (overlays); Exhibit 39, complete proceedings from the hearing before the bar committee for the 21st judicial circuit; Exhibit A, distribution sheet from files of respondent; Exhibits B through E, correspondence in relation to land in Arkansas; Exhibits H and I, relate to the Donnell Lee matter; Exhibit K answers of Doris Duckett to interrogatories, bearing her purported signature; and Exhibit N, petition in the Arkansas land case.

DORIS DUCKETT testified that her husband died on December 19, 1970, as the result of an accident involving Bi-State Development Agency; she met the respondent at the home of her sister and discussed the accident with him; she went to his office and might have signed some papers authorizing him to proceed with a damage suit; stated as to Exhibit 21 that it "looks like my signature, I am not sure"; we went to trial and when the trial began, jury was picked but she didn't testify and was told to go home; he (respondent) never contacted her about a settlement; talked to him about other things, but not about this suit; never authorized him to settle the case; never authorized the acceptance of $750.00; never saw Exhibit 3 (check from Beneficial) and not her endorsement on the check; talked to him about suit against Reliable one time, but didn't authorize settle-

ment with Reliable for $750.00; not her signature on Exhibit 4 (Stipulation for dismissal) not her signature on Exhibit 5 (General release from Reliable); didn't authorize anyone to sign Exhibit 4 (Stipulation for dismissal against Reliable); signed the checks, Exhibits 7 through 16; never discussed the suit with respondent and he never told her he had settled the Bi-State suit; Exhibit 17 her signature; Exhibit 18 her signature—must have signed it; and Exhibit 38 (two checks) received from respondent, got them through the mail.

CROSS: Exhibit 21 my signature. Didn't sign Exhibit 24—have never seen this exhibit; Exhibit 4; not my signature—never seen it before; Exhibit 2 never seen it before; not my handwriting; Exhibit 5 not my signature; signed yellow papers and perhaps Exhibit 21; when we went to court for trial, was told to go home; never talked to Witte. Did talk to him a year or so later, but not about the case. Called him in '75 about a stabbing. Talked to Witte about other matters—handling trouble with Donnell Lee; woman hitting her with a branch; basement contract; real estate in Arkansas belonging to her children; daughter's trouble; never paid Witte anything; was on Valium in '73 and '74; didn't know was supposed to pay a lawyer; didn't sign for medical authorization; never signed anything in Witte's office, unless it was the first time I was there; Exhibit K, I might have signed it.

WILLIAM H. STORER, after stating that he was a document examiner, sometimes referred to as a handwriting examiner, testified that: he had examined the exhibits and found that Exhibit 7 through 16 (checks) were the genuine signature of Doris Duckett; he prepared Exhibits 26 through 34B; that Exhibit 21 (Agreement of employment) was the genuine signature of Doris Duckett; Exhibits 2, 3, 4, 5, 6 and 24 not her genuine signature; that he found "important differences... letter construction...attempted imitation or forgeries ... stops and starts at unusual places, strokes that are added or patched to an

already executed signature"; when using his exhibits, the genuine signature on Exhibit 21 or Exhibit 2 he "found that they were very close, almost exact, overlay of the two signatures." When comparing his Exhibit 34A; "The signature on Exhibit 2 is a product of tracing—shows a slow, hesitating pen movement which was unlike that of the genuine Doris Duckett signature" ... explanation and illustration as to the questioned exhibits and the reasons for the conclusions he reached. On CROSS examination; "The questioned signatures were not written by the person who executed the known Doris Duckett signature on the checks"...; drugs or alcohol could affect the writer; Exhibits 17 and 18 not her genuine signature; signature on Exhibit 21 was with a soft tip pen and the one on Exhibit 2 was with a ballpoint; genuine signatures were smooth and even while the questionable signature was with a slow, hesitating movement; could not determine who made the signatures; couldn't tell whether same person signed the questioned documents; Exhibit 21 had indentations indicating tracing and matched what appeared on Exhibit 2.

The respondent, DONALD MARTIN WITTE, was permitted, by agreement, to give his direct testimony in narrative form and testified that: Doris Duckett's sister, Flora Mae Scott, called on December 21, 1970, and asked me to come to her house to meet Doris Duckett whose husband had died following an accident on a Bi-State Bus; signed up the case and got a medical authorization; filed suit against Bi-State, listed Doris Duckett as surviving spouse and six minor children who stated that all the children were fathered by her deceased husband; was advised that Reliable Life has refused to pay on accidental portion of policy on her husband; filed suit against Reliable Insurance on April 24, 1971; Doris Duckett signed interrogatories on May 29, 1971; Reliable filed a declaratory judgment suit which was dismissed on March 30, 1972 (Appeal dismissed also); Bi-State suit set for trial on January 3, 1973; advised by Doris Duckett that a suit was pending in Arkansas relative to land in which her

children had an interest; Doris Duckett called at least one time a month; when Bi-State case was called and started, determined that could not make a case and talked to Doris Duckett, her sister and some of the children before asking leave to dismiss the suit with the right to refile it within one year; she told me to do whatever I thought best and read Exhibit 0 to Doris Duckett; Doris Duckett presented some domestic problems relative to her daughter; September 25, 1973, had a call from the attorney for Bi-State who offered to pay $750.00 and immediately talked to Doris Duckett about the offer and she agreed to accept it; got the release; she know of settlement and agreed to it; documents signed and release and draft issued; she said she did not want the proceeds at that time because of trouble she was having with her sister; she owed me $446.00 fees and $250.00 for other matter and net to her was less than $100.00; had offer from Reliable Life for $750.00 and notified Doris Duckett and she accepted the offer; looked like her signature and I notarized her signature; saw Doris Duckett in hospital in 1975, she had wounds; sent her the checks and she phoned and said she had the two checks but had not been to the bank; received her complaint letter to Cunningham; Exhibit 17 and 18 were executed after the two checks had been executed; never did anything that was not first approved by Doris Duckett. He had coin collection of silver coins worth at least six hundred dollars.

Respondent, on cross examination, testified that: the contract of employment was taken to my office and retained there; he gave his files to Mr. Hibbits after the complaint was filed, including Exhibit 21; if there had been a tracing of Exhibit 21, it would have to have been done in my office; Exhibit 25 (copy of stipulation of dismissal) remained in my office; do not know whether mailed documents to Mrs. Duckett; usually put red marks where client was to sign, but do not know what was done in this case and there were no red marks on these documents; not conclusive that I mailed them to her; services in behalf of Doris Duckett in connection with Bi-State, Reliable Insurance,

Arkansas Land, basement problems, juvenile problems, assault on her; kept rough time estimates as to his services for her; did not send her bills for services; talked to her when settlements were discussed; went out to settle with Doris Duckett after complaints had been registered with a Mr. Littleton; Exhibit 17 in his handwriting, except signature of Doris Duckett, and used different pens; told her would charge her for the Reliable declaratory judgment suit and the Arkansas matter; Exhibits 17 and 18 were prepared about two weeks after conversation with Mr. Littleton; Doris Duckett orally expressed many times that he could hold out money from settlements for his fee; relationship with Doris Duckett was personal—she relied on him; doesn't recall seeing her sign Exhibit 2—does not know whether gave her a copy of Exhibit 21; letter from Doris Duckett to Tom Cummings (complaining about the respondent) was dated April 5, 1977, and respondent knew of no investigation until about May 18, 1977; never settled a case for Doris Duckett without her express or implied consent; never failed to inform her of settlement of Bi-State case; never agreed to settle the Reliable case without the express or implied consent of Doris Duckett; never placed or caused to be placed on any documents what purported to be the signature of Doris Duckett.

FLORA MAE SCOTT testified as follows: the older sister of Doris Duckett; on friendly terms with sister in 1970; respondent came to my house and met Mr. Witte—she wanted to sue the bus company; discussed the Reliable Insurance case—they wouldn't pay her, wanted him to represent her in that matter; in 1970 and 1971 she (Doris) was going to the clinic and "...she used to pass out quite a bit"; she went to a psychiatric ward at Barnes Hospital—used to visit her there; she passed out "quite often"—used to take her to the hospital and sometimes she went in an ambulance; she was taking medication; managing some of her affairs, buying her groceries and paying bills for her; husband not living with her at the time he was killed; she paid her sister's bills, shopping, etc., did practically everything;

Doris furnished the money to pay the bills, sometimes go with me to cash checks or sign them and I cash them; she got checks from A.D.C. and V.A.; would put the money in my account and pay the bills, keeping some cash to buy food for her (sister) and kids; never signed any of her checks; knew that she thought I stole some money from her; known Mr. Witte a long time—he has represented me—had and still have confidence in him; I believe in Mr. Witte; "I don't believe he did the thing, whatever she said he did".

The other evidence consisted of character witnesses in behalf of the respondent, Donald Witte; Barry A. Short, attorney at law, testified in person and Earl A. Fallin, President of Consumer Products Company, Richard K. Greenfield, Chancellor of the Junior College District of St. Louis, and John L. Heim, Attorney at Law and Reserve Intelligence Coordinator testified by affidavits (by agreement). All of said witnesses were well acquainted with the respondent, had worked with him, knew his contributions as an attorney, civic worker and in the many fields in which he was interested. All of them stated that he was a man of good moral character, trustworthy, honest, and his reputation for truth and veracity was excellent.

The information is in seven counts. Count IV charges that respondent failed to maintain a sufficient ballance in his special account. The proof on this count was not sufficient to be considered. All of the other counts pertain to matters covered herein and consist of allegations that are intermingled and center around similar charges.

From the evidence offered, it is clear that from the time of the establishment of the client-attorney relationship, the respondent had a very difficult client. She was unpredictable, uncooperative, evasive and her health led to taking medication that affected her judgment and activities. Her testimony was vague, contradictory, confusing and lacked believability. She failed to disclose all facts and circumstances. The credibility of

the respondent far exceeded that of the complaining witness. The testimony of all of the lay witnesses would clearly justify a dismissal of all charges against the respondent.

However, the testimony of the handwriting expert, William H. Storer, casts a different light on the charges. He was a qualified expert on questioned documents. His testimony as to the tracing was especially impressive. Nevertheless, even an expert can be wrong about some things. He testified that Exhibits 17 and 18 were not the signatures of Doris Duckett. She testified that they were her signature. There was no evidence as to who performed the foregeries or when it was done. The fact that Exhibit 21 was in the file of the respondent at all times until the investigation began is very strong evidence that the tracing, if such there was, was done in the office of the respondent. He denies that it was done by him or with his consent or his knowledge. As to the believability of the evidence of Doris Duckett in contrast to that of the respondent, there could be little doubt; however, as to believability of the expert witness and the respondent, there could be some doubt.

Conclusions Of Law

The allegations in the information filed herein relate to Supreme Court Rule 4. The specific charges involve:

"DR 1-102 Misconduct

(A) A lawyer shall not:

(1) Violate a disciplinary Rule.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any conduct that adversely reflects on his fitness to practice law.

"DR 7-101 Representing a Client Zealously

(A) A lawyer shall not intentionally:

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 7-102(B).

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102 (B).

DR 7-102 Representing a Client Within the Bounds of Law

(A) In representing a Client, a lawyer shall not:

(8) Knowingly engage in other illegal conduct contrary to a Disciplinary Rule.

DR 9-102 Preserving Identity of funds and property of a client.

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive."

As has been stated by the Supreme Court, "The main purpose of a disciplinary proceedings is to inquire into the fitness of an attorney to continue in the practice of law. The object is not

to punish the attorney, but to protect the public and to protect the integrity of the profession and the Courts". In re Randolph, 347 S. W. 2d 91, 109 (Mo. banc 1961) and In re matter of Bear, 578 S.W. 2d 928 (Mo. banc 1979). The public must be protected and the integrity of the courts maintained. This does not mean that disbarment should always be resorted to when charges are filed. Disbarment is an extreme measure and should be resorted to when it appears that the attorney should never be at the bar. From the evidence in this case, it appears that the conduct of the respondent was an isolated case. There is no showing of a line of misconduct by the respondent. His reputation appears to be excellent.

In order to make a finding disbarring an attorney, "The evidence must be sustained by a preponderance of the evidence". Matter of Duncan, 541 S. W. 2d 564, 569 (Mo banc 1976). The evidence in this case is not substantial with reference to the testimony of the complaining witness. Without taking anything from the good faith and excellent work of the expert on questionable documents, his testimony is subject to careful scrutiny. His testimony is in direct conflict with the testimony of the respondent and in some instances is in conflict with the testimony of Doris Duckett.

From all the evidence, it is concluded that the respondent did keep Doris Duckett informed as to his actions and had her consent to make the settlements which were made. He acted very unwisely in not keeping better records and in not making settlements with her as to the settled claims. His office procedures in this case were not good. He appeared to be meticulous in most of his office work, but lax in other steps taken.

The evidence as a whole does not demonstrate that the respondent should not be at the bar. This was an isolated case. Respondent should not be disbarred and should not have his license suspended.

Recommendation

It is the conclusion of the undersigned that the respondent should receive a public reprimand for the manner in which this case was handled in his office. His license should not be taken from him or suspended.

Respectfully submitted,

/s/ Marshall Craig, Master

APPENDIX D

Motion for Rehearing

SUPREME COURT OF MISSOURI
en banc
May 26, 1981
No. 61379

In Re: Donald M. Witte,
Respondent.

Comes now respondent, Donald M. Witte, and respectfully moves the Court to grant him a rehearing of this Court's decision of May 11, 1981, because the following material matters of law and fact were overlooked and misinterpreted by the majority result opinion and by the Court in reaching its decision and judgment:

1. The Court overlooked and did not even discuss numerous mitigating circumstances in assessing the punishment in this case. This is an isolated instance for Respondent, who is 54 years of age and has been practicing law for 19 years. He has an excellent reputation and is of good moral character and has served the community for 15 years as a member of the Junior College Board of Trustees, as a member of the Alliance for Regional Community Health, and as a member for 16 years of the Eagle Scout Association during which time he was on its Board for 12 years, was President for 2 years, and was a financial sponsor for an intercity program for young black boy scouts. He has served his country as a member of the Naval Reserve Intelligence Program since 1957 with top secret clearance and currently as a captain in that reserve (Tr. 295-297). The opinion in this case correctly states that mitigating circumstances are relevant but then, unfortunately, fails to discuss, and hence apparently has overlooked, this

Respondent's good record and his achievements for his country and his community. As a result, the punishment meted out of this case is disproportionate to the misconduct. It also shocks the conscience and violates concepts of fundamental fairness inherent in the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 10, of the Missouri Constitution. A leader in the community with an exemplary record of public service should not be disbarred for commingling $118.60 of client funds. The Court should rehear this case in order to hear argument over whether a lesser sentence should be imposed.

2. The majority result opinion in this case appears to do indirectly that which it specifically refuses to do directly. While the opinion's final eight pages are meant to consider mitigating circumstances, it appears that what they really do is rule *sub silentio* that Respondent is a forger and hence deserves to be disbarred. Then, however, the opinion concludes that because Respondent is guilty of commingling, the forgery issue need not be decided. Thus, mitigation is not really discussed (see paragraph 1 above). Nor has it been briefed or argued. Instead, it has been inextricably, erroneously and prejudicially intertwined with the forgery issue. It is respectfully submitted that the Court should therefore grant a rehearing for the purpose of the filing of briefs and hearing argument on the mitigation issue. As it now stands, this issue has not been briefed, argued, or discussed.

3. The majority result opinion assumes without discussion that Respondent was guilty of commingling $118.60 in client funds when, in fact, the evidence, and the law as applied to that evidence, is clear that there was no commingling as a matter of law. Under the law and the canons of ethics Respondent had no duty to keep the proceeds of the settlement checks in a separate trust account because they were a retainer for work to be performed on an ongoing basis for the client (Tr. 86, 279, 283-284, 334-335). Respondent's mistaken belief that he had a duty to segregate those proceeds is not grounds for disbarment.

4. The legal issue of what constitutes improper commingling of funds has been overlooked and misinterpreted by the Court. Under what circumstances a lawyer may place money not yet earned by him in his own account, rather than in a client trust account, is an area of the law which needs authoritative elucidation by the Supreme Court. In this case, a lawyer stands disbarred for his own apparently erroneous interpretation of that legal issue.

5. The majority result opinion has overlooked and misinterpreted its own line of cases which hold that the Court, on the issue of witness credibility, should defer to the master assigned the task of hearing the evidence and seeing and judging the credibility of the witnesses. In the opinion at hand, however, the Court apparently holds that it can judge the credibility of the witnesses on the basis of the cold record.

6. The majority result opinion has overlooked the fact that the evidence is undisputed that Respondent was unaware of any mental or physical frailty of his client until October, 1978 which was *after* commencement of proceedings against Respondent. That this was overlooked by the opinion is demonstrated by the statement in the opinion (at page 3) that Respondent had a higher duty of conduct by reason of these frailities rather than a lesser one. Respondent's duty during the representation was unaffected by those frailities since the undisputed testimony is that he was unaware of them (Tr. 354; B.C. III 78).

7. The majority result opinion has overlooked the fact that Respondent was charged with forgery, not with commingling. It was an unlawful departure and a denial of due process for him to be convicted of an offense not charged. Rule 5.15 of the Supreme Court Rules; Amendment XIV, U.S. Constitution; Article I, Section 10, Missouri Constitution. The only commingling charge for violation of D.R. 9-102(A) is contained in Count IV. That count, however, was patently defective since it charges Respondent with failure in 1974-76 to segregate money

received as a result of a settlement of Cause No. 22873-F. That case, however, was voluntarily dismissed on January 4, 1973 and the later settlement in January, 1974 was not the result of the lawsuit but, rather, of later negotiations (Tr. 269-277).

8. The majority result opinion overlooked the fact that Respondent was not found guilty by the Special Master of professional misconduct. He found Respondent guilty of acting "very unwisely in not keeping better records and in not making settlements with her [his client] as to the settled claims" and because his "office procedures in this case were not good." Specifically, the Special Master ordered him reprimanded "for the manner in which this case was handled in his office." *Opinion of Special Master at page 11.* Hence, the finding in the majority result opinion that the Special Master "found respondent guilty of professional misconduct" (at page 1) is clearly erroneous, overlooks what was found, and a rehearing should be granted to correct that finding and also, as previously noted, to determine whether in fact the evidence supports a finding that Respondent was guilty of commingling or should be disbarred if he is guilty.

9. The majority result opinion states that there was an overdraft on Respondent's business account in February, 1974 (Slip Opinion at 9). Not only is the opinion incorrect because the overdraft was in the special account, but, more importantly, the opinion overlooks and therefore does not state that the overdraft was not due to Respondent overdrawing the account but, rather, due to the Internal Revenue Service (erroneously) placing a tax levy on the special account (Tr. 322-324).

KOHN, SHANDS, ELBERT,
GIANOULAKIS & GILJUM

/s/ Alan C. Kohn - 16015

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Attorneys for Respondent

Copy of the foregoing mailed to Mr. Merle Silverstein this 22nd day of May, 1981.

/s/ Alan C. Kohn

Suggestions In Support Of Respondent's Motion For Rehearing

Introduction

The judgment is disbarment. Unfortunately, however, there is no *ratio decidendi* by the Court for this extreme result. Three of seven members of the Court find the judgment too harsh. Three others reason that Respondent admittedly commingled $118.60 of client funds, that there are no mitigating circumstances, and that the result should be the most severe punishment within the Court's power to assess. One member of the Court concurs only in the result reached but not in the reasoning.

It is respectfully submitted that the reason for the absence of consensus and of a majority opinion is that the issues addressed in the opinions were neither briefed nor argued. The case charged, presented and submitted was whether Respondent was guilty of forgery. On the fact of the opinions of the Court, that issue was never reached. This circumstance has caused the Court to overlook and misinterpret important issues of law and relevant facts in discussing this case. It is respectfully submitted that nothing less than a full rebriefing and reargument of the issues of commingling and the appropriate punishment for commingling is required in this case where Respondent faces a death sentence to his life as a lawyer.

I.

The punishment is too harsh and the court misinterpreted the law and overlooked the facts in making its assessment.

"Let the punishment fit the crime." This rule of fundamental fairness was well-accepted long before Gilbert and Sullivan made it famous in the Mikado. Here the crime is wrongfully

commingling $118.60 of client money; the punishment is disbarment. There is no fit between the two.

Your Respondent has attempted, in the short time permitted, to research all reported disciplinary cases to determine, in cases where there has been unlawful commingling, how much money was commingled and what punishment was assessed. The results are attached to these Suggestions as Appendix I.* They show that never has any court in this Nation assessed such an extreme penalty for such an offense. Based on Appendix I, Respondent believes this result is unwarranted. It also denies to him due process of law guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 10, of the Missouri Constitution because it is so extreme that it shocks the conscience and denies to him that fundamental fairness which is required by the Due Process Clause. *Cf. Rochin* v. *California,* 342 U.S. 165 (1952).

It appears from a close reading of the majority result opinion that the explanation for the decision reached in this case is that, after finding Respondent guilty of commingling $118.60, the opinion, rather than discussing undisputed evidence of mitigation (at pages 5-11), rules *sub silentio* that Respondent is a forger and that therefore the punishment is justified.** This ap-

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* Respondent believes that Appendix I contains all Missouri cases where commingling, or more, was charged; all cases in the United States in the last five years where commingling, or more, was charged; and all cases in the United States before 1976 where only commingling was charged. Time and space did not permit an exhaustive review of all pre-1976 cases.

** On the issue of forgery, the Bar Committee did not make a case because handwriting expert Storer testified emphatically that Mrs. Duckett did not sign Exhibits 17 and 18 and that those signatures were forged (Tr. 181-183, 190-192). In fact, the evidence was clear she did sign them (Tr. 44, 45). This hopeless conflict in the Committee's own testimony defeated its case of forgery.

parent unfortunate circumstance has caused the Court to overlook and not even mention the mitigating circumstances that clearly exist. Respondent has an excellent reputation and is of good moral character. This incident is an isolated one, and there is no pattern of conduct or evidence that Respondent has ever commingled the funds of any other client. Respondent has served the community well as a member of the Junion College Board of Trustees for 15 years; as a member of the Alliance for Regional Community Health; and as a member of the Eagle Scout Association for 16 years during which time he served as a member of its Board for 12 years, and its President for 2 years, and as a financial sponsor for an intercity program for young black boy scouts. He has also served his country well as a member of the Naval Reserve Intelligence Program since 1957 with top secret clearance and currently as a Captain in that Reserve* (Tr. 295-297).

All of these mitigating circumstances are entitled to consideration yet they were entirely overlooked by the majority result opinion. In not mentioning Respondent's good record and service to the community, the majority result opinion has overlooked the many cases clearly and unequivocally holding that "[w]hile these facts [in mitigation] constitute no defense in this type of proceeding the Court may consider them in determining what action should be taken under the circumstances." *In Matter of Miller,* 568 S.W.2d 246, 253 (en banc. 1978); *In re Landon,* 319 S.W.2d 553, 558 (en banc. 1959); *In re Lurkins,* 374 S.W.2d 67, 68 (en banc. 1964).

As the minority result opinion mentions, there is also the issue of compassion, even for a lawyer. Clarence Darrow once said, in defense of his representation of Loeb and Leopold, "Even the rich have rights." Surely, it is appropriate to paraphrase

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*Respondent is a veteran, is 54 years old, has been a member of the Bar for 19 years, has a wife, and has three children who are in college.

that statement, as the minority result opinion has done (at page 2) and say, "Even the lawyers are entitled to compassion."* Or, as Joseph Conrad said:

> What humanity needs is . . . compassionate pity in this life and infinite mercy on the day of judgment. *Notes on Life and Letters. The Life Beyond.*

This Court has compassionate pity and should extend it here.

Moreover, because the majority result opinion really did not consider the issue of mitigation, the record is left standing that a lawyer with an excellent record who commingled $118.60 in client funds deserves to be disbarred. The Bar must be held to the highest standards of integrity and ethics, and the Court should come down hard on unlawful commingling. With this no one would disagree. But surely, in view of the amount involved, the isolated nature of offense, the excellent prior record of Respondent, and the lack of an authoritative decision by this Court as to what constitutes unlawful comingling (see Part II *infra*), the price here paid is too high. It is respectfully submitted therefore that the Court should rehear the case, consider the mitigation as such, and reassess Respondent's punishment.

II.

Respondent is not guilty of unlawful commingling of client's funds, and the majority result opinion overlooked and misinterpreted an important point of law in holding otherwise.

The first part of the majority result opinion holds that it is undisputed and admitted that Respondent wrongfully commingled client funds (slip opinion at pages 3, 5). This holding is based, unfortunately, on Respondent's admitted, but nonetheless

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* Shakespeare, of course, would not agree: "The first thing we do, let's kill all the lawyers." *King Henry VI, Part II* Act IV, Scene 2.

mistaken, belief that he had a duty to segregate that portion of the proceeds of the settlement checks due his client and not yet earned by him, and that therefore he set aside a coin collection as her security for his failure to do so.

The testimony, however, was that the proceeds from the settlement checks were *retainer* funds belonging to Respondent which he had no duty to segregate. While the majority result opinion accepts the fact that Respondent could rightfully claim all but $118.60 of those funds as his because he had already performed legal services justifying such a claim, it overlooks the testimony that the $118.60 was to be used by Respondent for services to be rendered in the future:

> She further stated that she would probably be asking me to do further things for her *and that I should use these proceeds [from the Bi-State settlement] to pay for anything that I did in the future for her.* (Tr. 279; emphasis supplied).
>
> . . . .
>
> *Once again Mrs. Duckett advised me that due to the continued problem she was having with Mrs. Scott, her sister, and her daughters, that she wished that I would keep the net she was due from this [Reliable] settlement in addition to the prior settlement with Bi-State.* (Tr. 283-284; emphasis supplied; see also Tr. 334-335).
>
> . . . .
>
> Q So in 1975 when you talked to Mr. Witte you had it in your mind that you might get some money from the Bi-State?
>
> A Right.
>
> Q *For your case and that would help pay the fee for the Donnell Lee matter?*

A *Yes.*

Q *Did you feel at any time that the Bi-State money that you might get would help you in any other matters that Mr. Witte was handling for you?*

A *Well, considering my financial problem, yes, a little.* I wasn't looking for no fifty thousand dollars.

Q But he was kind of handling your business affairs, kind of on a credit basis, right?

A No, no.

Q Did you ever pay him anything?

A No.

Q *But you expected him to handle the Donnell Lee matter?*

A *On the basis I thought I had some money coming.*

(Tr. 86; emphasis supplied)

The gist of the testimony is, therefore, that any settlement proceeds due the client were a retainer for Respondent to be used for ongoing services to be rendered.

Under Disciplinary Rule 9-102(A), such a retainer is payment belonging to the attorney and need not be deposited in his trust account:

> It is the opinion of the Advisory Committee that an attorney who receives a retainer or advance payment of fees is not required to deposit that fee in an escrow or trust account until it is earned. Such fees may be deposited directly into the attorney's office account.

Missouri Bar Advisory Committee Informal Opinion No. 3, rendered April 4, 1980 (*1980 Mo. Bar Bulletin 3*). See also

Calkins, *Dilemmas in Professional Ethics,* 1979 Journal of Missouri Bar 457:

> "What, then, is the status of a retainer advanced by a client for legal services? In the absence of some special agreement by which it would remain the client's money (simply held by counsel pending performance of services), it should be considered payment belonging to the attorney and therefore appropriate for deposit in his account.

Where a dispute later develops over the retainer, then it should probably be transferred to the lawyer's trust account pending disposition of that dispute, although this may be a cloudy area of the law. See D.R. 9-102(A)(2); Arizona Bar Association Opinion 141 (Feb. 11, 1964), reported in *6 Arizona Bar Journal 23 (Dec. 1970).* Here, however, at the time Respondent kept the settlement proceeds as a retainer, there was no dispute between the Respondent and his client.

Where a lawyer accepts money as a retainer or an advance on cash outlays and specifically agrees to place that money in his trust account, it would appear that he can thereafter withdraw that money as a retainer if specifically so authorized by the client. See *In Re Maloney,* No. 62,004, pending in this Court en banc. He cannot, however, withdraw the money from his trust account for his own legal fees after a dispute arises between him and his client. *Dillard* v. *Payne,* Supreme Court of Missouri, Cause No. 62498, decided May 11, 1981, Division 1. Nonetheless, it seems clear that absent an agreement to place a retainer in a trust account, it may be placed in the lawyer's business account. *D.R. 9-102(A); Advisory Committee Informal Opinion and Calkins, supra.*

Here, there was no agreement to place the money in a trust account, and Respondent's misapprehension of his duty notwithstanding, he had a right not to segregate the funds and he could ethically place them in his own account. The money received was a retainer out of which Respondent was to be paid

for past services *and for future services*. He mistakenly believed that he had a duty to segregate that portion of the retainer not yet earned. In that respect he admitted his guilt, and his admission has been accepted by the Court and is the cornerstone for the majority result opinion for his disbarment. Respondent, however, had no such duty to segregate the unearned retainer and, it is respectfully submitted, the Court should have, or should now, consider this important, but unbriefed and unargued, issue of ethics relating to wrongful commingling. No authoritative decision by this Court on this issue has yet been rendered, and with the potential consequences for commingling so severe, the Bar would be well served at this time by an opinion of the Court on this important question.

It is conceded that there could also be an issue of credibility of witnesses with respect to the facts concerning the alleged commingling. The Court's Special Master, however, has resolved that issue in favor of Respondent and found that Mrs. Duckett's testimony "lacked believability." Where, as here, there is a direct conflict in the testimony of the witnesses and the Master has had an opportunity to observe those witnesses, the Court need not but *should* defer to the Master on this issue rather than rely on its review of the cold record. The majority result opinion (at page 1) has overlooked and not discussed cases so stating:

> [O]n credibility we are not in as good a position as the commissioner was to judge who is and who was not telling the whole truth. We cannot but be impressed by the fact that he had ample opportunity to observe three of the principal characters in person. . . .

Seiler, J., for the Court in *Re Gamblin*, 458 S.W.2d 321, 323 (en banc. 1970). In so holding, Judge Seiler cites *In re Parkinson*, 128 S.W.2d 1023 (en banc. 1939) where the Court held (at page 1039):

> Our learned commissioner['s] . . . opportunity to form a proper estimate of the weight and value to be given the testimony of the several witnesses is admittedly superior to ours. He saw them on the stand, and observed their attitude and demeanor while testifying, and, indeed, based his findings, in large part, thereon. We have carefully considered the several matters urged upon us by the informants, and while meritorious, they are not deemed sufficiently convincing as to justify us in rejecting the findings of our commissioner, and substituting therefor a contrary, independent judgment based upon the cold record alone.

To the same effect, see *In re Sizer,* 134 S.W.2d 1085, 1117 (Spr. 1939); *State* v. *Stupp Bros. Bridge & Iron Co.,* 380 S.W.2d 382, 394 (en banc. 1964); *State* v. *Orton,* 465 S.W.2d 618, 620 (en banc. 1971); *In re Downs,* 363 S.W.2d 679, 682 (en banc. 1963); *In re Wines,* 370 S.W.2d 328, 334 (en banc. 1963); *In re Jones,* 431 S.W.2d 809, 811 (en banc. 1966); *cf. Matter of W-K-M,* 537 S.W.2d 183, 186 (K.C. 1976).

In short, the Court should accept the Special Master's findings on credibility and reject Respondent's legal conclusions on commingling rather than the other way around.

III.

Respondent's conviction of an offense not charged is a departure and denies to him due process of law because he stands convicted of commingling in violation of D.R. 9-102(A) when he was not charged with that offense.

It is fundamental that in a disciplinary proceeding the information must contain the specific acts of misconduct of which Respondent stands convicted. Here, there was no competent charge of a violation of D.R. 9-102(A). The closest the information comes to a charge of violation of that Disciplinary Rule is Count IV which alleges Respondent in 1974-1976 commingled funds received as a result of a settlement of Cause No. 22873-F.

That case, however, was dismissed in 1973 and the settlement that occurred in January, 1974 was not, as a matter of law, the result of Cause No. 22873-F but, rather, a result of later negotiations. Hence, there is no competent charge in the information of commingling and Respondent's conviction of that offense is a departure and a denial of due process of law because he has been convicted of offenses not charged. Rule 5.15 of the Supreme Court Rules; Amendment XIV, U.S. Constitution, Article I, Section 10, Missouri Constitution; *Matter of Alpers,* 574 S.W.2d 427, 429 (en banc. 1978); *In re Sizer,* 134 S.W.2d 1085, 1104 (Spr. 1939); *State ex rel. Johnson* v. *Gebhardt,* 87 Mo. App. 542, 547-548 (St. L. 1901, Goode, J.).

CONCLUSION

An extreme penalty has been here imposed and there is no opinion of Court in justification. The cause of this unfortunate result is that the issues of mitigation and commingling were neither briefed nor argued, and, as a consequence, the Court, in assessing this punishment, has overlooked and misinterpreted the law and the facts relating to those issues. It is respectfully submitted that the Court should grant a rehearing, call for new briefs on these two issues, and set the matter down for oral argument.

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Copy of the foregoing mailed to Mr. Merle Silverstein this 22nd day of May, 1981.

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Appendix 1

In re Robinson, 519 S.W.2d 1 (Mo. en banc. 1975); misappropriation of client's funds $1,200; disbarred.

In re Wendt, 544 S.W.2d 3 (Mo. en banc. 1976); failure to return $3,500; censured.

In re Houtchens, 555 S.W.2d 24 (Mo. en banc. 1977); failed to remit $7,500 plus*; suspended with leave to apply for reinstatement in 3 years.

In re Montrey, 511 S.W.2d 805 (Mo. en banc. 1974); failure to separate $3,550 of client's funds plus; suspended 6 months.

In re Simmons, 576 S.W.2d 324 (Mo. en banc. 1978); failed to pay client's hospital fee of $3,429 plus; disbarred.

In the Matter of Miller, 568 S.W.2d 246 (Mo. en banc. 1978); misappropriated $30,000; suspended 2 years.

In re Wilson, 391 S.W.2d 914 (Mo. en banc. 1965); converted $6,212; disbarred.

In re Coleman, 492 S.W.2d 750 (Mo. en banc. 1973); misused $41,500; suspended one year.

In re Sullivan, 494 S.W.2d 329 (Mo. en banc. 1973); failure to account $1,000 plus; public reprimand.

In re Spitzer, 107 S.W.2d 946 (Mo. App. Spfld. 1937); failed to account amount unknown plus; suspended 6 months.

In re Williams, 128 S.W.2d 1098 (Mo. App. K.C. 1939); borrowing $8,500 from estates plus; suspended 2 years.

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* Plus means that there were additional serious violations found against the attorney.

In re Speiser, 294 S.W.2d 656 (Mo. App. St.L. 1956); failed to account $444.71; suspended 1 year.

In re Oliver, 285 S.W.2d 648 (Mo. en banc. 1956); misappropriated $7,000 plus; disbarred.

In re Downs, 225 S.W.2d 834 (Mo. App. K.C. 1952); converted $20,000 funds from estate; disbarred.

In re Conner, 207 S.W.2d 492 (Mo. en banc. 1948); converted funds and failed to pay over sums held as administrator of estate, amount unknown; disbarred.

In re Kaemmerer, 178 S.W.2d 474 (Mo. App. St.L. 1944); failed to account $1,812.50 plus; suspended 2 years.

In re Weiner, 547 S.W.2d 459 (Mo. en banc. 1977); misappropriated $480; suspended indefinitely with leave to apply for reinstatement in two years.

In re West, 148 S.W.2d 67 (Mo. App. Spfld. 1941); failed to account $100, reprimand.

In re Lacy, 112 S.W.2d 594 (Mo. App. St.L. 1937); failed to account over $10,000 plus; disbar.

In re Block, 136 S.W.2d 358 (Mo. App. St.L. 1940); misappropriation $711.68 plus; disbar.

In re Mattes, 409 S.W.2d 54 (Mo. banc. 1966); failure to account $10,134 plus; suspended indefinitely with leave to apply for reinstatement in 3 years.

In re Conrad, 105 S.W.2d 1 (Mo. banc. 1937); failure to account more than $1,000 plus; suspended 4 months.

Finch v. *State Bar,* 621 P.2d 253 (Cal. in bank 1981); misappropriation $5,750 plus; suspended 5 years, execution stayed, 6 months suspension, remainder probation.

People v. *Gellenthien,* 621 P.2d 328 (Colo. en banc. 1981); failure to return $1,155.04; public censure.

People v. *Davis,* 620 P.2d 725 (Colo. en banc. 1980); commingling $7,106.76, failure to account for $1,154.04 plus; disbarred with leave to apply for reinstatement in 8 years.

Rogers v. *State Bar,* 620 P.2d 1030 (Cal. in bank 1980); misappropriation and commingling over $7,000, second time offender; disbarred.

Giovanazzi v. *State Bar,* 619 P.2d 1005 (Cal. in bank 1980); mismanagement of trust funds $2,451.85; suspended 3 years, execution stayed, suspended 30 days, remainder probation.

People v. *Kendrick,* 619 P.2d 65 (Colo. en banc. 1980); unauthorized appropriation of funds $2,197.60; suspended 3 years.

In re English, 618 P.2d 1275 (Or. in banc. 1980); commingling $40 and failure to deposit $380 into client trust fund plus; suspended 3 months.

Tenner v. *State Bar,* 617 P.2d 486 (Cal. 1980); misappropriation approximately $8,000 plus; suspended 3 years.

Office of Disciplinary Counsel v. *Smith,* 617 P.2d 80 (Hawaii 1980); misappropriation $3,900 plus; disbarred.

State ex rel. Oklahoma Bar Assn. v. *Smith,* 615 P.2d 1014 (Ok. 1980); misappropriation $25,000 plus; disbarred.

In the Matter of Salves, 614 P.2d 1264 (Wash. en banc. 1980); failure to account $7,500 plus; suspended 2 years.

Blair v. *State Bar,* 612 P.2d 924 (Cal. in bank 1980); misappropriation approximately $6,000 plus; suspended 2 years, execution stayed, suspended 6 months, remainder probation.

People v. *Johnson,* 612 P.2d 1097 (Colo. en banc. 1980); failure to return unearned fee $1,000; public censure.

People v. *Hilgers,* 612 P.2d 1134 (Colo. en banc. 1980); misappropriation amount unknown plus; disbarred 10 years with leave to apply for reinstatement thereafter.

Jackson v. *State Bar,* 591 P.2d 47 (Cal. in bank 1979); commingling over $20,000 plus; suspended 5 years, execution stayed, suspended 3 years, remainder probation.

Attorney Grievance Commission v. *Micka,* 422 A.2d 383 (Md. App. 1980); misappropriation $5,500 (per phone call to attorney for commission); disbarred.

Blum v. *Committee on Professional Standards,* 432 N.Y.S.2d 268 (App. Div. 1980); commingling amount unknown plus; suspended 2 years.

Ziehm v. *Committee on Professional Standards,* 430 N.Y.S.2d 723 (App. Div. 1980); commingling amount unknown plus; suspended 1 year.

In re Moringiello, 429 N.Y.S.2d 272 (App. Div. 1980); converted $250,000 of client's funds plus; disbarred.

Sklover v. *Grievance Comm.,* 428 N.Y.S.2d 92 (App. Div. 1980); commingling and failure to account $15,109.50; suspended 1 year.

Attorney Grievance Comm. v. *Garson,* 413 A.2d 564 (Md. App. 1980); misappropriation amount unknown plus; disbarred.

In the Matter of Barron, 271 S.E.2d 474 (Ga. 1980); commingling $7,209.16 plus; suspended 2 years.

In the Matter of Collins, 271 S.E.2d 473 (Ga. 1980); failure to return unearned fee plus; public reprimand.

In the Matter of Byars, 268 S.E.2d 155 (Ga. 1980); commingling amount unknown; suspended indefinitely.

In the Matter of Hines, 269 S.E.2d 766 (S.C. 1980); commingling amount unknown plus; disbarred.

In the Matter of Allen, 266 S.E.2d 167 (Ga. 1980); commingling amount unknown plus; reprimand.

In the Matter of Nicholson, 257 S.E.2d 195 (Ga. 1979); failure to account amount unknown plus; reprimand.

Florida Barr v. *Fussell,* 390 So.2d 68 (Fla. 1980); several month delay in returning unearned fee amount unknown; reprimand.

Florida Bar v. *Matthews,* 389 So.2d 1004 (Fla. 1980); converted approximately $38,000; disbarred.

Florida Bar v. *Chapnick,* 388 So.2d 1036 (Fla. 1980); failure to account and disburse over $30,000 of clients' funds; 3 years probation.

Florida Bar v. *Kates,* 387 So.2d 947 (Fla. 1980); commingling $74.50 plus; suspended 3 months and one day.

Florida Bar v. *Greenspahn,* 386 So.2d 523 (Fla. 1980); commingling $6,000 plus; suspended 6 months.

Florida Bar v. *Welty,* 382 So.2d 1220 (Fla. 1980); commingling over $24,000 plus; suspended 6 months.

Florida Bar v. *Kurtz,* 381 So.2d 705 (Fla. 1980); misappropriated $180,000; leave granted to resign without leave to seek reinstatement.

Florida Bar v. *Sterling,* 380 So.2d 1295 (Fla. 1980); misappropriated $5,000; reprimand.

In re Schlax, 405 N.E.2d 778 (Ill. 1980); misappropriated approximately $95,000; suspended 3 months.

In the Matter of Castello, 402 N.E.2d 970 (Ind. 1980); commingling over $15,000 plus; disbarred.

In re Clayter, 399 N.E.2d 1318 (Ill. 1980); commingling $1,000; censured.

In the Matter of Michaelson, 298 N.W.2d 69 (Minn. 1980); commingling $1,368 plus; suspended 5 years.

In the Matter of Shaw, 298 N.W.2d 133 (Minn. 1980); commingling $10,000; reprimand, 3 years probation.

In re Kesler, 397 N.E.2d 574 (Ind. 1979); commingling $27,500 plus; disbarred.

In re Turner, 387 N.E.2d 282 (Ill. 1979); commingling $850 plus; suspended 3 years.

In re Smith, 387 N.E.2d 316 (Ill. 1979); commingling over $7,500 plus; disbarred.

In the Matter of Silverman, 289 N.W.2d 683 (Mich. 1980); commingling approximately $1,000; reprimand.

In the Matter of McWhorter, 284 N.W.2d 472 (Mich. 1979); failed to account approximately $6,000; suspended 121 days.

In the Matter of Primus, 283 N.W.2d 519 (Minn. 1979); misappropriation amount unknown plus; disbarred.

Florida Bar v. *Breed,* 378 So.2d 783 (Fla. 1980); converted $7,816 of clients' funds; suspended 2 years.

Florida Bar v. *Tobin,* 377 So.2d 690 (Fla. 1979); failure to account amount unknown; public reprimand.

Florida Bar v. *Stewart,* 376 So.2d 234 (Fla. 1979); misappropriation $260; suspended 6 months, 2 years probation.

Louisiana State Bar Assn. v. *Jordan,* 375 So.2d 89 (La. 1979); failure to account $3,000; disbarred.

Florida Bar v. *Bassett,* 369 So.2d 583 (Fla. 1979); failure to account over $20,000; disbarred.

Louisiana Bar Assn. v. *Jones,* 372 So.2d 1186 (La. 1979); commingling $1,000 plus; suspended 6 months.

In the Matter of Schwenn, 373 So.2d 1076 (Ala. 1979); commingling amount unknown; suspended 6 months.

Louisiana State Bar Assn. v. *Stinson,* 368 So.2d 971 (La. 1979); commingling approximately $4,100; suspended 3 years.

Louisiana State Bar Assn. v. *Rivette,* 368 So.2d 1045 (La. 1979); commingling approximately $1,500; suspended 1 year, reprimand.

In the Matter of Marks, 424 N.Y.S.2d 229 (App. Div. 1980); misappropriation $31,345.46 plus; disbarred.

In the Matter of Caruso, 421 N.Y.S.2d 228 (App. Div. 1979); failure to account $343 plus failing to cooperate with grievance committee and its investigation; disbarred.

In the Matter of Hacker, 421 N.Y.S.2d 229 (App. Div. 1979); conversion of over $30,000 of clients' funds plus; disbarred.

Benzinger v. *Grievance Committee,* 414 N.Y.S.2d 403 (App. Div. 1979); failing to keep sufficient balance in trust account; suspended 2 years.

In re Glick, 413 N.Y.S.2d 753 (App. Div. 1979); converting over $20,000 of clients' funds; suspended 2 years.

Attorney Grievance Commission v. *McIntire,* 405 A.2d 273 (Md. App. 1979); misappropriation $1,563 plus; reprimand.

In re Bernstein, 407 A.2d 169 (Vt. 1979); conversion amount unknown plus; disbarred.

Attorney Grievance Commission v. *Bailey,* 408 A.2d 1330 (Md. App. 1979); failure to separate client's funds $1,185.15 plus; suspended 3 years.

Cain v. *State Bar,* 603 P.2d 464 (Cal. 1980); failure to maintain trust account plus; disbarred.

Office of Disciplinary Counsel v. *DeMello,* 601 P.2d 1087 (Hawaii 1979); converting $2,705.57 to own use plus; disbarred.

Jackson v. *State Bar,* 600 P.2d 1326 (Cal. in bank. 1979); commingling over $4,000 plus; disbarred.

In the Matter of Van Baalen, 597 P.2d 985 (Ariz. 1979); failure to return unearned portion of fee plus; censure.

In the Matter of Couser, 596 P.2d 26 (Ariz. in banc. 1979); misappropriation $15,000; suspended one year.

In the Matter of Hawkins, 272 S.E.2d 694 (Ga. 1980); failure to remit $75,000 due client; disbarred.

In the Matter of Chance, 272 S.E.2d 686 (Ga. 1980); failure to account amount unknown plus; disbarred.

In the Matter of Drose, 272 S.E.2d 173 (S.C. 1980); commingling amount unknown plus; public reprimand.

In the Matter of Nicholson, 257 S.E.2d 195 (Ga. 1979); failure to account amount unknown plus; public reprimand.

Kentucky Bar Assn. v. *Martin,* 580 S.W.2d 224 (Ky. 1979); failed to return unearned fee of as much as $3,000 plus; suspended 3 years.

Kentucky Bar Assn. v. *Burroughs,* 578 S.W.2d 39 (Ky. 1979); commingling $17,000; public reprimand.

Florida Bar v. *Carlton,* 366 So.2d 406 (Fla. 1978); failed to disburse $3,500 to client plus; suspended 12 months.

Florida Bar v. *Morrison,* 362 So.2d 1356 (Fla. 1978); failure to account for over $100,000 plus; disbarred.

Louisiana State Bar Assn. v. *Batson,* 359 So.2d 70 (La. 1978); commingling approximately $10,000; suspended 6 months.

Florida Bar v. *Berger,* 358 So.2d 14 (Fla. 1978); failure to account unknown plus; suspended one year.

Florida Bar v. *Weaver,* 356 So.2d 797 (Fla. 1978); failure to keep sufficient funds in account $20,000 plus; disbarred.

Florida Bar v. *Horner,* 356 So.2d 292 (Fla. 1978); commingling $4,800; public reprimand.

Florida Bar v. *Allen,* 355 So.2d 778 (Fla. 1978); failure to account $420 plus; suspended one year.

Florida Bar v. *Holmes,* 353 So.2d 85 (Fla. 1977); mishandling of trust funds amount unknown; public reprimand.

Florida Bar v. *Kavouklis,* 353 So.2d 844 (Fla. 1977); failure to turn over clients' funds $29,000; disbarred.

Florida Bar v. *Breed,* 353 So.2d 846 (Fla. 1977); failure to maintain sufficient balance in trust fund; suspended 3 years.

Florida Bar v. *Cobourn,* 345 So.2d 334 (Fla. 1977); failure to account $50,000 plus; suspended until just cause is shown to modify.

Florida Bar v. *Duffee,* 343 So.2d 829 (Fla. 1977); converted $45,800 plus; disbarred.

In the Matter of Craig, 249 S.E.2d 915 (S.C. 1978); commingling amount unknown plus; suspended indefinitely.

In the Matter of Mason, 245 S.E.2d 424 (S.C. 1978); commingling amount unknown plus; public reprimand.

Committee on Legal Ethics v. *Pence,* 240 S.E.2d 668 (W.Va. App. 1977); commingling amount unknown plus; license annulled, attorney had previously been suspended.

In the Matter of Clay, 234 S.E.2d 229 (S.C. 1977); misappropriation approximately $17,000; disbarred.

Matter of Francovich, 575 P.2d 931 (Nev. 1978); failure to return unearned fee of $1,000 plus; public reprimand.

In re McCormick, 576 P.2d 371 (Or. 1978); converted $6,000; disbarred.

People v. *Good,* 576 P.2d 1020 (Colo. en banc. 1978); failure to segregate client's funds $10,000 plus; suspended indefinitely with leave to apply for reinstatement in 2 years.

In re Leon, 584 P.2d 1255 (Kan. 1978); commingling amount unknown; public censure.

Disciplinary Board v. *Kim,* 583 P.2d 333 (Hawaii 1978); misappropriation approximately $45,000; disbarred.

In the Matter of Gibson, 583 P.2d 633 (Wash. en banc. 1978); misappropriation over $25,000 plus; disbarred.

In the Matter of Kumbera, 580 P.2d 1167 (Wash. en banc. 1979); commingling approximately $2,000; suspended 1 year.

Inniss v. *State Bar,* 573 P.2d 852 (Cal. in bank. 1978); failure to deposit clients' money in trust account amount unknown plus; suspended 3 years, execution stayed, actual suspension 4 months.

State ex rel. Oklahoma Bar Assn. v. *Kessler,* 573 P.2d 1214 (Ok. 1978); commingling $14,000; suspended 18 months.

Athearn v. *State Bar,* 571 P.2d 628 (Cal. in bank 1979); converting approximately $29,000; suspended 1 year, required to pass Professional Responsibility Examination as condition for reinstatement.

In re Pierson, 571 P.2d 907 (Or. in banc. 1977); commingling $56,000; disbarred.

Bar Assn. of Greater Cleveland v. *Standard,* 340 N.E.2d 847 (Ohio 1976); failure to maintain records of incoming funds plus; suspended indefinitely.

Kentucky Bar Assn. v. *Wilson,* 555 S.W.2d 953 (Ky. 1977); commingling $281.19 plus; disbarred.

Allen v. *State Bar,* 570 P.2d 1226 (Cal. in bank. 1977); failed to account $60,000 plus; disbarred.

Fitzpatrick v. *State Bar,* 569 P.2d 763 (Cal. 1977); commingled and misappropriated $12,000 plus; disbarred.

Worth v. *State Bar,* 551 P.2d 16 (Cal. in bank 1976); commingling $25,000 plus; suspended 3 years, execution stayed, 3 year probation, suspended 1 year.

Heavey v. *State Bar,* 551 P.2d 1238 (Cal. 1976); commingling $353.65 plus; suspended 2 years, execution stayed, 2 year probation, suspended 30 days.

In re Albright, 549 P.2d 527 (Or. in banc. 1976); misuse of clients' funds amount unknown plus; public reprimand, suspended 5 years.

People v. *Spiegel,* 544 P.2d 401 (Colo. en banc. 1976); commingling $5,000; public censure.

Greenbaum v. *State Bar,* 544 P.2d 921 (Cal. in bank. 1976); misappropriated $11,000; suspended 4 years, execution stayed, probation 4 years, suspended 3 months.

In re Abbott, 561 P.2d 285 (Cal. in bank 1977); misappropriation $29,500 which led to conviction for grand theft; disbarred.

In re Elliott, 266 N.W.2d 430 (Wis. 1978); commingling amount unknown plus; suspended 6 months.

In re Geralds, 263 N.W.2d 241 (Mich. 1978); converting $13,000 plus; suspended 3 years.

In re the Matter of Marine, 264 N.W.2d 285 (Wis. 1977); misappropriated $2,500 plus; suspended 6 months.

In the Matter of Mazza, 262 N.W.2d 767 (Wis. 1978); misuse of clients' funds amount unknown plus; suspended indefinitely with leave to petition for reinstatement in one year.

In the Matter of Schroeder, 257 N.W.2d 464 (Wis. 1977); commingling $3,000; reprimand, suspended 2 months.

Committee on Professional Ethics and Conduct v. *Toomey,* 253 N.W.2d 573 (Ia. 1977); commingling tax client's funds $600 plus; disbarred.

State ex rel. Nebraska State Bar Assn. v. *Ledwith,* 250 N.W.2d 230 (Neb. 1977); converted possibly as much as $23,000 plus; disbarred.

State v. *Hersh,* 243 N.W.2d 178 (Wis. 1976); commingling $7,000 plus; suspended, may apply for reinstatement in 2 years.

In re Sterns, 243 N.W.2d 312 (Minn. 1976); commingling amount unknown; suspended, may apply for reinstatement in one year.

In the Matter of Williams, 240 N.W.2d 246 (Mich. 1978); conversion amount unknown; suspended, may apply for readmission in 5 years.

In the Matter of Baun, 240 N.W.2d 728 (Mich. 1976); commingling $147,000 plus; disbarred.

State v. *Aldrich,* 237 N.W.2d 689 (Wis. 1976); commingling $5,000; suspended 6 months.

Ides' Case, 395 A.2d 498 (N.H. 1978); commingling amount unknown plus; suspended one year.

Attorney Grievance Commission v. *McBurney,* 392 A.2d 81 (Md. App. 1978); misappropriation $6,000; disbarred.

Attorney Grievance Commission v. *Flynn,* 387 A.2d 775 (Md. 1978); commingling $2,100 plus; suspended indefinitely.

In the Matter of Stout, 382 A.2d 630 (N.J. 1978); misuse of trust funds $40,000; suspended one year.

In the Matter of McManus, 381 A.2d 352 (N.J. 1978); conversion of at least $5,000 plus; disbarred.

In the Matter of Reardon, 369 A.2d 666 (Del. 1977); failure to place clients' funds in separate account $7,000 plus; suspended one year.

In the Matter of Reed, 369 A.2d 686 (Del. 1977); failure to maintain and preserve on hand all monies to be held on behalf of clients approximately $42,000; public censure, $5,000 fine.

In the Matter of Green, 368 A.2d 245 (Pa. 1977); failure to account $2,000 plus; disbarred.

Matter of Lyons, 365 A.2d 913 (N.J. 1976); misappropriation $18,000 plus; disbarred.

In the Matter of Leopold, 366 A.2d 227 (Pa. 1976); misappropriation $5,500 plus; disbarred.

Beck v. *Committee on Professional Standards,* 403 N.Y.S.2d 564 (App. Div. 1978); converted $1,200 plus; suspended one year.

In the Matter of Lewis, 392 N.Y.S.2d 34 (App. Div. 1977); converting $6,569.84; disbarred.

In the Matter of Pappas, 392 N.Y.S.2d 96 (App. Div. 1977); conversion amount unknown plus; suspended 6 months.

In the Matter of Lombardi, 391 N.Y.S.2d 644 (App Div. 1977); converting $6,100 plus; disbarred.

In the Matter of Alvaro, 391 N.Y.S.2d 722 (App. Div. 1977); conversion amount unknown plus; suspended 6 months.

In the Matter of Burns, 390 N.Y.S.2d 517 (App. Div.); conversion of $23,971.78; disbarred.

In the Matter of Burke, 390 N.Y.S.2d 675 (App. Div. 1977); failing to maintain escrow account plus; censure.

In the Matter of Barnett, 383 N.Y.S.2d 625 (App. Div. 1976); conversion $7,100 plus; disbarred.

In the Matter of Iversen, 381 N.Y.S.2d 711 (App. Div. 1976); conversion $20,000 plus; disbarred.

In the Matter of Cochran, 383 N.E.2d 54 (Ind. 1978); converted $9,000 plus; disbarred.

Ohio State Bar Assn. v. *Roest,* 374 N.E.2d 1366 (Ohio 1978); failed to keep funds separated $2,437 plus; indefinite suspension.

In re Stillo, 368 N.E.2d 897 (Ill. 1977); conversion $1,350 plus; disbarred.

Ohio State Bar Assn. v. *Willard,* 361 N.E.2d 452 (Ohio 1977); commingling amount unknown plus; disbarred.

In re Brody, 357 N.E.2d 498 (Ill. 1976); commingling $500; suspended.

In re Frey, 357 N.E.2d 511 (Ill. 1976); commingling $7,000 plus; disbarred.

In the Matter of Noel, 350 N.E.2d 623 (Ind. 1976); commingling amount unknown plus; suspended 180 days.

Akron Bar Assn. v. *Hughes,* 348 N.E.2d 712 (Ohio, 1976); commingling $53,000 plus; suspended indefinitely.

Cincinnati Bar Assn. v. *Lacinak,* 348 N.E.2d 723 (Ohio, 1976); failure to preserve identity of client's funds $16,013 plus; disbarred.

In re Smith, 347 N.E.2d 133 (Ill. 1976); conversion approximately $19,000 plus; disbarred.

In re Fuchs, 340 N.E.2d 762 (Ind. 1976); commingling approximately $35,000 plus; suspended 90 days.

Cain v. Board of Commissioners of Alabama State Bar, 345 So. 2d 1343 (Ala. 1977); misappropriation $7,000 plus; suspended 18 months without automatic reinstatement.

Gassman v. *State Bar,* 553 P.2d 1147 (Cal. 1976); commingling $28,000 plus; 2 year suspension with execution stayed and probation imposed, with one year period of actual suspension.

Worth v. *State Bar,* 586 P.2d 588 (Cal. 1978); misappropriation $1,633, second offense; disbarred.

Hamilton v. *State Bar,* 591 P.2d 1254 (Cal. in bank. 1979); commingling $325, failure to account $6,571.38 plus; disbarred.

In the Matter of Moore, 518 P.2d 562 (Ariz. en banc. 1974); commingling $71,000 plus; disbarred.

In the Matter of Clark, 406 A.2d 28 (Del. 1979); commingled $100,000; disbarred.

Office of Disciplinary Counsel v. *Johnson,* 611 P.2d 993 (Hawaii 1980); commingling $1,000 plus; prior discipline, disbarred.

Disciplinary Board v. *Kim,* 583 P.2d 333 (Hawaii 1978); misappropriation $46,000; disbarred.

Tarver v. *Board of Commissioners of Alabama State Bar,* 274 So.2d 61 (Ala. 1973); misappropriation $200 plus; suspended 3 months, public reprimand.

Schultz v. *State Bar,* 543 P.2d 600 (Cal. in bank. 1975); misappropriated $1,250, commingled $400; suspended one year.

Schullman v. *State Bar,* 547 P.2d 447 (Cal. in bank. 1976); converted $800 plus; disbarred.

Fielding v. *State Bar,* 509 P.2d 193 (Cal. in bank. 1973); converted $1,253.30; suspended 3 years with execution stayed and probation imposed for 3 years on condition of 6 month suspension.

Persion v. *State Bar,* 509 P.2d 524 (Cal. in bank. 1973); misappropriation $12,500 plus; suspended 3 years.

Mrakich v. *State Bar,* 506 P.2d 633 (Cal. in bank. 1973); converted $2,600; suspended 1 year.

Sevin v. *State Bar,* 504 P.2d 449 (Cal. in bank. 1973); misappropriated approximately $15,000 plus; disbarred.

Bernstein v. *State Bar,* 495 P.2d 1289 (Cal. in bank. 1972); commingling $3,500 plus; suspended 30 days.

Brody v. *State Bar,* 521 P.2d 107 (Cal. in bank. 1974); commingling $16,000 plus; suspended 1 year.

Silver v. *State Bar,* 528 P.2d 1157 (Cal. in bank. 1974); commingling amount unknown plus; suspended 3 years with 1 year actual suspension.

Tomlinson v. *State Bar,* 531 P.2d 1119 (Cal. in bank. 1975); converted $1,300 plus; prior discipline, disbarred.

Bradpiece v. *State Bar,* 518 P.2d 337 (Cal. in bank. 1974); commingled $15,000; suspended 5 years, execution stayed, 1 year actual suspension, 4 years probation.

Vaughn v. *State Bar,* 494 P.2d 1257 (Cal. in bank. 1972); converted $1,000; public reproval.

Zitny v. *State Bar,* 415 P.2d 521 (Cal. in bank. 1966); commingled $12,000 plus; public reprimand.

Simmons v. *State Bar,* 450 P.2d 291 (Cal. in bank. 1969); commingled $1,200; suspended 4 years, with actual suspension for two years.

Lefner v. *State Bar,* 410 P.2d 832 (Cal. in bank. 1966); commingled $2,500 plus; disbarred.

Florida Bar v. *Weaver,* 279 So.2d 298 (Fla. 1973); commingling $150; public reprimand.

Florida Bar v. *Chickering,* 240 So.2d 148 (Fla. 1970); failure to keep sufficient funds $8,902.74; disbarred 1 year.

Florida Bar v. *Pahules,* 233 So.2d 130 (Fla. 1970); failed to account $14,052.37; suspended 6 months.

Committee on Professional Ethics v. *Shaffer,* 230 N.W.2d 1 (Ia. 1975); commingling $4,916; disbarred.

Attorney Grievance Commission v. *Flynn,* 387 A.2d 775 (Md. App. 1978); commingling $2,100 plus; suspended indefinitely.

Louisiana State Bar v. *Weysham,* 307 So.2d 336 (La. 1975); commingling amount unknown plus; disbarred.

Louisiana State Bar Assn. v. *Brown,* 291 So.2d 385 (La. 1974); commingled $1,500 plus; disbarred.

Louisiana State Bar Assn. v. *Jacques,* 257 So.2d 413 (La. 1972); commingling of $72,500 plus; disbarred.

Florida Bar v. *Enwright,* 172 So.2d 584 (Fla. 1965); commingling $20,00; disbarred.

State ex rel. Florida Bar v. *Ruskin,* 126 So.2d 142 (Fla. 1961); commingling amount unknown; suspended 6 months.

Florida Bar v. *Welsh,* 309 So.2d 537 (Fla. 1975); converted $899 prior discipline; disbarred.

Florida Bar v. *MacKenzie,* 319 So.2d 9 (Fla. 1975); commingled $13,000; suspended 6 months, followed by 3 years probation.

APPENDIX E

Order Overruling Respondent's Motion for Rehearing

SUPREME COURT OF MISSOURI
en banc
June 8, 1981
No. 61379

In Re: Donald M. Witte,
Respondent.

"Respondent's motion for rehearing overruled."

APPENDIX F

Motion to Rescind the Present Mandate and Motion to Stay Issuance of Mandate

SUPREME COURT OF MISSOURI
en banc
June 11, 1981
No. 61379

In Re: Donald M. Witte,
Respondent

Comes now Respondent, Donald M. Witte, who moves this Court to rescind the present mandate ordered issued by this Court in this matter and further moves this Court to stay the issuance of a mandate in this matter pending the Respondent's appeal and/or application for Writ of Certiorari to the United States Supreme Court, and in support thereof states:

1. Respondent believes that he has a good and meritorious appeal in the United States Supreme Court on the following grounds:

1.1 The Rules of the Supreme Court of Missouri governing the disciplining of attorneys (Rule No. 5) prevented the Respondent from receiving a fair and just hearing and further prevented the Respondent from appealing this judgment within the State of Missouri, as is the case with all other professions, in violation of the Respondent's rights to a fair and just hearing, to due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

1.2 The Respondent was found guilty of an act of professional misconduct by this Court, however, Count IV of the In-

formation as filed against the Respondent was patently defective in that it referred to the settlement of a pending lawsuit, which had in fact been previously dismissed without prejudice, so as to have failed to specifically inform the Respondent of the act that he was charged to have committed, and thereby to have denied Respondent a fair and just hearing, due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

1.3 The Respondent was also found guilty by this Court of an act of professional misconduct, which was not included in the Information by the finding that the Respondent commingled part of the settlement of the claim against Reliable Life Insurance Company, so as to have totally failed to have informed the Respondent of this charge, and thereby to have denied a fair and just hearing, due process of law and equal protection of the law to the Respondent, as guaranteed by the Fourteenth Amendment to the United States Constitution.

1.4 The substantial credible evidence of the complainant, Doris Duckett, and the Respondent support the finding that the money in question was in fact a retainer out of which the Respondent was to be paid for past services and future services, which are required to be retained in a trust account, so that the Respondent is not guilty of commingling, as found by this Court. This Court has either ignored this evidence or failed to consider it, so as to deprive the Respondent to a fair and just hearing and to violate the Respondent's right to a fair and just hearing, to due process of law and equal protection of the law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

1.5 This Court in its Judgment has included several statements as the basis or foundation for it finding against the Respondent, that are contrary to the evidence, which are fully set out in Respondent's Motion for Rehearing and Suggestions in Support of Respondent's Motion for Rehearing and include

the statement that the Master found Respondent guilty of professional misconduct; that Respondent was aware of Doris Duckett's physical and mental problems; and that the Respondent allowed an over draft in his trust account. These misstatements were part of the foundation for the Court to support its opinion and judgment. Without these findings the Court could not find against the Respondent, so that due to these misstatements within the opinion and judgment the bias and prejudice against the Respondent was established to allow this Court to find that the Respondent had commingled $118.60 and to warrant disbarment, all which violated the Respondent's right to a fair and just hearing, to due process of law and to equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

1.6 The issue that the Respondent had knowledge of the physical and mental condition of Doris Duckett was not discussed by the Master, or in the Brief of the Informant, or in the oral argument of the Informant, both who saw and heard the testimony and evidence. The Master and Informant both knew that the Respoondent was unaware of these conditions and further that the Respondent did not take advantage of Doris Duckett, due to these conditions, so that this issue was not before this Court. For this Court to inject this issue at this stage is totally improper, since the only way that this Court could reach this conclusion was from the cold record of black ink on white paper. This is totally against this Court's prior decisions, where it has relied upon the findings of the master on credibility and other findings of fact, so as to violate Respondent's right to a fair and just hearing, to due process of law and to equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution.

1.7 The punishment is exceedingly harsh according to the separate opinion of Judge J. P. Morgan, which is concurred in by Chief Judge J. Bardgett and Special Judge Welborn. The

punishment being imposed is too extreme and unwarranted, so as to deny Respondent due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution because it is so extreme that it shocks the conscience and denies to the Respondent that fundamental fairness which is required by the Due Process Clause.

2. The Respondent shall expedite the filing of all pleadings with the United States Supreme Court on his appeal and/or application for Writ of Certiorari.

3. The Respondent has never been before this Court previously on a charge of professional misconduct, that the Respondent has a history of long and dedicated service to his community and country, that this matter originated with the complainant's letter dated April 5, 1977, so that this matter has been pending over four (4) years, that the Respondent has very great financial obligations at this time, since his three children are in college (two of whom are in out-of-state universities), and that if this Motion is not granted, the Respondent will be irreparably injured and damaged, and especially so, if the Supreme Court of the United States should accept this appeal and/or Writ of Certiorari and later rule in favor of the Respondent, so that the Respondent will have no remedy to right the damage to him.

4. The Respondent is ready to accept any type of supervision of his activities or reporting to this Court or an agent of this Court during the Stay of the Mandate.

5. The Respondent will report this status of his appeal and/or application for Writ of Certiorari to the United States Supreme Court as often as this Court deems fit.

WHEREFORE, Respondent, Donald M. Witte respectfully moves this Court to rescind the present mandate ordered issued by this Court and further moves this Court to stay the issuance of a mandate in this matter pending the Respondent's appeal

and/or application for Writ of Certiorari to the United States Supreme Court.

Dated: June 11, 1981.

Respectfully submitted,

Donald M. Witte
Respondent, Pro Se
310 St. Paul Title Building
201 South Central Avenue
Clayton, MO 63105
726-2525

Two copies of the above have been mailed by first class mail, postage prepaid, Mr. Merle Silverstein, Attorney for Informant at 7777 Bonhomme Avenue, Clayton, MO 63105 on this 11th day of June, 1981.

Donald M. Witte

APPENDIX G

Order Sustaining Respondent's Motion to Rescind Present Mandate and Order Granting Stay of Issuance of Mandate

SUPREME COURT OF MISSOURI
en banc
June 15, 1981
No. 61379

In Re: Donald M. Witte,
Respondent

Now at this day, on consideration of Respondent's motion to rescind mandate, it is ordered by the Court that the mandate heretofore issued in the above entitled cause be, and the same is hereby sustained, and the mandate is recalled.

On motion of Respondent, issuance of mandate is stayed pending Respondent's petition for writ of certiorari or appeal to the Supreme Court of the United States. It is further ordered by the Court that Respondent is to notify the Clerk of this Court of the filing of appeal or petition for certiorari in the Supreme Court of the United States and any and all orders issued thereon.

APPENDIX H

Notice of Appeal

SUPREME COURT OF MISSOURI
en banc
July 6, 1981
No. 61379

In Re: Donald M. Witte,
Respondent

Notice is hereby given that Donald M. Witte, the Respondent-Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Missouri entered herein June 8, 1981, which overruled Respondent's Motion for Rehearing and which ordered the Respondent-Appellant disbarred.

This appeal is taken pursuant to 28 USC Sections 1257 (2) or 1257 (3).

/s/ DONALD M. WITTE
Respondent-Appellant Pro Se
310 St. Paul Title Building
201 South Central Avenue
Clayton, MO 63105
(314) 726-2525

I certify that I mailed a copy of the above Notice of Appeal to Merle L. Silverstein, 7777 Bonhomme, Suite 1414, Clayton, Missouri 63105, Attorney for all appellees; to the Honorable John Ashcroft, Attorney General of Missouri, Supreme Court Building, Jefferson City, Missouri 65101; and to The Honorable Christopher C. Bond, Governor of the State of Missouri, Office of the Governor, Missouri State Capitol, Jefferson City, Missouri 65101, this 3rd day of July, 1981.

/s/ Donald M. Witte
Respondent - Appellant, Pro Se

APPENDIX I

Information (Filed April 24, 1979)

SUPREME COURT OF MISSOURI
April 24, 1979
No. 61379

In Re: Donald M. Witte,
Respondent.

Comes now Informant, the Bar Committee of the Twenty-First Judicial Circuit of the State of Missouri, and for its Information against Respondent, DONALD M. WITTE, states to the Court as follows:

1. Informant is the duly appointed and acting Bar Committee of the Twenty-First Judicial Circuit of the State of Missouri, having been so appointed and constituted by the Supreme Court of Missouri in accordance with Supreme Court Rules 5.10 and 5.11, and thereby having and exercising the powers and authority, as provided by Supreme Court Rules 5.12 through 5.13, to investigate, conduct hearings, make findings and recommendations, and file and maintain actions in this Court, with regard to matters of professional misconduct by or on the part of lawyers, committed in, or by lawyers maintaining their offices or residences in, the said Twenty-First Judicial Circuit, which comprises the County of St. Louis in the State of Missouri.

2. Respondent is now, and has been at all times during the commission of the acts and occurrence of the facts and events herein set forth, a duly licensed and practicing lawyer in the State of Missouri, and maintaining his offices for the practice of law in St. Louis County, Missouri, within the Twenty-First Judicial Circuit of this State.

3. After completion by Informant of its investigation of the matters set forth herein and a finding by a majority of Informant that there was reasonable cause to believe that Respondent had committed professional misconduct in the respects mentioned herein, a formal hearing was conducted by Informant which commenced on August 20, 1978 and which proceedings were subsequently concluded on November 15, 1978. After due and deliberate consideration of the matters presented during said formal hearing, a majority of the members of Informant have concluded and found that there is probable cause to believe that Respondent is guilty of the misconduct charged. Informant, having so found, now files this Information in this Court.

4. The specific acts of misconduct with which Respondent is charged are as follows:

Count I

That in approximately October of 1973 Respondent did agree to settle and did settle the matter of Doris Duckett, et al. v. Bi-State Development Agency, et al., being Cause 22873-F pending in the circuit Court of the City of St. Louis, Missouri, for the sum of Seven Hundred Fifty Dollars ($750.00) plus the payment of costs without the knowledge of and without the express or implied consent of his client, all in violation of Supreme Court Rule 4; DR 1-102(A)(1)(4)(5)(6); DR 7-101(A)(2)(3) and DR 7-102(A)(8).

Count II

That as part of Respondent's unauthorized settlement of the matter of Doris Duckett, et al. v. Bi-State Development Agency, et al., being Cause 22873-F which had been pending in the Circuit Court of the City of St. Louis, Missouri, he placed, or caused to be placed, upon various documents, including a "Release of All Claims" and a

bank draft for Seven Hundred Fifty Dollars ($750.00), what purported to be the signature of his client, Doris Duckett, without her express or implied consent, all in violation of Supreme Court Rule 4; DR 1-102(A)(1)(4)(5)(6); DR 7-101(A)(3) and DR 7-102(A)(8).

Count III

That between approximately October of 1973 and February of 1976 Respondent failed to inform his client, Doris Duckett, of the settlement of the matter of Doris Duckett, et al. v. Bi-State Development Agency, et al., being Cause 22873-F which had been pending in the Circuit Court of the City of St. Louis, Missouri, or of the receipt of Seven Hundred Fifty Dollars ($750.00) as the proceeds of said settlement all in violation of Supreme Court Rule 4; DR 1-102(A)(1)(4)(5)(6) and DR 9-102(B)(1)(3)(4).

Count IV

That between February 1, 1974 and February of 1976 Respondent failed to maintain a sufficient balance in his "Special Account" at the Clayton Bank, being account #92555200, to cover the amount due to his client, Doris Duckett, from the settlement of the matter of Doris Duckett et al. v. Bi-State Development Agency, et al. being Cause 22873-F which had been pending in the Circuit Court of the City of St. Louis, Missouri, all in violation of Supreme Court Rule 4; DR 9-102(A).

Count V

That in approximately November of 1974 Respondent did agree to settle and did settle the matter of Doris Duckett v. The Reliable Life Insurance Company, being Cause 25163-F pending in the Circuit Court of the City of St. Louis, Missouri, for the sum of Seven Hundred Fifty Dollars ($750.00) plus the payment of costs, without the

knowledge of and without the express or implied consent of his client, Doris Duckett, all in violation of Supreme Court Rule 4; DR 1-102(A)(1)(4)(5)(6); DR 7-101(A)(2)(3) and DR 7-102(A)(8).

Count VI

That as part of Respondent's unauthorized settlement of the matter of Doris Duckett v. The Reliable Life Insurance Company, being Cause 25163-F which had been pending in the Circuit Court of the City of St. Louis, Missouri, he placed, or caused to be placed, upon various documents, including a "General Release," a "Stipulation of Settlement" and a bank draft for Seven Hundred Fifty Dollars ($750.00), what purported to be the signature of his client, Doris Duckett, without her express or implied consent, all in violation of Supreme Court Rule 4; DR 1-102(A)(1)(3)(4)(5)(6); DR 7-101(A)(3) and DR 7-102(A)(8).

Count VII

That between approximately November of 1974 and February of 1976 Respondent failed to inform his client, Doris Duckett, of the settlement of the matter of Doris Duckett v. The Reliable Life Insurance Company, being Cause 25163-F which had been pending in the Circuit Court of the City of St. Louis, Missouri, or of the receipt of Seven Hundred Fifty Dollars ($750.00) as the proceeds of said settlement, all in violation of Supreme Court Rule 4; DR 1-102(A)(1)(4)(5)(6) and DR 9-102(B)(1)(3)(4).

5. In order to protect the interests of the public and Bar of this State Respondent should be disciplined by reprimand or suspension from the practice of law for an indefinite period or a fixed time or disbarment and removal from the roll of attorneys licensed to practice law in this State, upon due consideration of the premises.

WHEREFORE, Informant prays that this Court enter its findings that the charges of professional misconduct against Respondent contained in this Information are true and render a judgment that Respondent is guilty of the acts of professional misconduct as herein charged, and reprimanding, suspending or disbarring Respondent from the practice of law in this State, as the Court may deem to be just and proper in the premises.

BAR COMMITTEE OF THE
TWENTY-FIRST JUDICIAL
CIRCUIT, INFORMANT

/s/ By: Arthur H. Slonim
Chairman

/s/ By: Charles M. Schmidt
Secretary

/s/ By: Merle L. Silverstein
Special Counsel to the Bar
Committee of the Twenty-First
Judicial Circuit
7777 Bonhomme, Suite 1414
Clayton, Missouri 63105

APPENDIX J

Answer (To Information)

SUPREME COURT OF MISSOURI
No. 61379

In Re: Donald M. Witte,
Respondent.

Comes now Respondent who files herein his Answer to the Information previously filed with this Court, and states to the Court as follows:

1. Respondent admits that the Informant is and was duly appointed and acting as the Bar Committee of the Twenty-First Judicial Circuit of the State of Misosuri in accordance with Supreme Court Rules 5.10 and 5.11 through 5.13 as set-out in paragraph 1 of the Information.

2. Respondent admits the allegations contained in paragraph 2 of the Information.

3. Respondent is without sufficient fact, information knowledge or belief to make a determination as to whether the allegations set-out in paragraph 3 of the Information are true or not and therefore Respondent must deny same.

4. Respondent denies each and every allegation contained in paragraph 4 of the Information, including Counts I through VII, and further denies that he committed any acts of misconduct, as alleged.

Count I

5. Respondent specifically denies each and every allegation contained in Count I of paragraph 4 of the Information and in support thereof states:

5.1 Doris Duckett testified under oath at the hearings before the Informant that at no time did she ever advance the Court Costs or any other costs to Respondent for him to handle any legal matter for her, so that Respondent could not have settled any claim on her behalf in which she advanced the Court Costs;

5.2 On or about September 25, 1973, Respondent did convey by telephone to Doris Duckett the fact that Bi-State Development Agency had offered $750.00 to settle her claim and the claim of her children for the alleged wrongful death of Thadius Duckett (husband of Doris Duckett and alleged father of her children) against Bi-State Development Agency, and at that time Doris Duckett gave her express consent to settle this claim for $750.00, however, Respondent requested and was granted express authority to continue negotiations up-and-until January 3, 1974 before accepting this offer, in an attempt to obtain a larger settlement offer;

5.3 Respondent continued his negotiations with Bi-State Development Agency without success and kept Doris Duckett fully advised by telephone of these negotiations, that between December 26, 1973 and December 31, 1973, Respondent telephoned Doris Duckett and advised her that Bi-State Development Agency would not increase its offer, and that Doris Duckett once again gave Respondent her express authority to settle this claim for $750.00; and

5.4 Respondent specifically denies that he committed any acts in violation of Supreme Court Rule 4; DR 1-102 (A) (1) (4) (5) (6); DR 7-101 (A) (2) (3); and DR 7-102 (A) (8), as alleged.

Count II

6. Respondent specifically denies each and every allegation contained in Count II of paragraph 4 of the Information and in support thereof states:

6.1 On September 25, 1973, Respondent did convey by telephone to Doris Duckett the fact that Bi-State Development Agency had offered $750.00 to settle her claim and the claim of her children for the alleged wrongful death of Thadius Duckett (husband of Doris Duckett and alleged father of her children) against Bi-State Development Agency, and at that time Doris Duckett gave her express consent to settle this claim for $750.00, however, Respondent requested and was granted express authority to continue negotiations up-and-until January 3, 1974 before accepting this offer, in an attempt to obtain a larger settlement offer;

6.2 Respondent continued his negotiations with Bi-State Development Agency and kept Doris Duckett fully advised by telephone of these negotiations, that between December 26, 1973 and December 31, 1973, Respondent telephoned Doris Duckett and advised her that Bi-State Development Agency would not increase its offer, and that Doris Duckett once again gave her express authority to settle this claim for $750.00;

6.3 Respondent specifically denies that he placed, or caused to be placed, upon various documents, including a "Release of All Claims" and a bank draft for Seven Hundred Fifty Dollars ($750.00) what purported to be the signature of his client, Doris Duckett, without her express or implied consent;

6.4 Respondent at all times during the settlement of the claim of Doris Duckett and the claim of her children for the alleged wrongful death of Thadius Duckett (husband of Doris Duckett and alleged father of her children) against Bi-State Development Agency was acting with the express authority and consent of Doris Duckett;

6.5 Respondent is of the opinion that the signatures on the "Release of All Claims" and a bank draft for Seven Hundred Fifty Dollars ($750.00) are that of Doris Duckett, which were executed in the settlement of the claim of Doris Duckett and the claim of her children for the alleged wrongful death of Thadius

Duckett (husband of Doris Duckett and alleged father of her children) against Bi-State Development Agency, and if these signatures are not those of Doris Duckett, then these signatures by some other person or persons were placed upon these documents at the express direction, authority and consent of Doris Duckett; and

6.6 Respondent specifically denies that he committed any acts in violation of Supreme Court Rule 4; DR 1-102 (A) (1) (4) (5) (6); DR 7-101 (A) (3); and DR 7-102 (A) (8), as alleged.

Count III

7. Respondent specifically denies each and every allegation contained in Count III of paragraph 4 of the Information and in support thereof states:

7.1 Respondent did not settle any claim in approximately October of 1973 as alleged, so that Respondent did not and could not have failed to inform Doris Duckett of the settlement of the matter of Doris Duckett, et al. v. Bi-State Development Agency, et al., being Cause 22873-F in the Circuit Court of the City of St. Louis, Missouri, as alleged by Informant;

7.2 On September 25, 1973, Respondent did convey by telephone to Doris Duckett the fact that Bi-State Development Agency had offered $750.00 to settle her claim and the claim of her children for the alleged wrongful death of Thadius Duckett (husband of Doris Duckett and alleged father of her children) against Bi-State Development Agency and at that time Doris Duckett gave her express consent to settle this claim for $750.00, however, Respondent requested and was granted express authority to continue negotiations up-and-until January 3, 1974 before accepting this offer, in an attempt to obtain a larger settlement offer;

7.3 Respondent continued his negotiations with Bi-State Development Agency without success and kept Doris Duckett

fully advised by telephone of these negotiations, that between December 26, 1973 and December 31, 1973, Respondent telephoned Doris Duckett and advised her that Bi-State Development Agency would not increase its offer, and that Doris Duckett once again gave Respondent her express authority to settle this claim for $750.00;

7.4 Respondent at all times during the settlement of the claim of Doris Duckett and the claim of her children for the alleged wrongful death of Thadius Duckett (husband of Doris Duckett and alleged father of her children) against Bi-State Development Agency was acting with the express authority and consent of Doris Duckett;

7.5 During January of 1974, Doris Duckett expressly authorized Respondent to: First, deposit, cash and collect proceeds from the settlement bank draft from the settlement of her claim and the claim of her children for the alleged wrongful death of Thadius Duckett (husband of Doris Duckett and alleged father of her children) against Bi-State Development Agency, that later the proceeds were collected by Respondent; Second, re-imburse Respondent for the expenses that Respondent had incurred in the prosecution of this claim; Third, deduct Respondent's attorney fee to prosecute this claim; Fourth, deduct the attorneys' fee due Respondent for legal services performed for and at the express request of Doris Duckett on other legal matters; and Fifth, retain the net balance until Doris Duckett requested it;

7.6 Respondent between February 1, 1974 and March 13, 1976 kept Doris Duckett fully informed of the amount of the net proceeds due her from the settlement of her claim and the claim of her children for the alleged wrongful death of Thadius Duckett (husband of Doris Duckett and alleged father of her children) against Bi-State Development Agency; and

7.7 Respondent specifically denies that he committed any acts in violation of Supreme Court Rule 4; DR 1-102 (A) (1) (4) (5) (6); and DR 9-102 (B) (1) (3) (4), as alleged.

Count IV

8. Respondent specifically denies each and every allegation contained in Count IV of paragraph 4 of the Information and in support thereof states:

8.1 Between February 1, 1974 and March 13, 1976, Respondent at the express request of Doris Duckett set-aside and retained the net balance due her from the settlement of her claim and the claim of her children for the alleged wrongful death of Thadius Duckett (husband of Doris Duckett and alleged father of her children) against Bi-State Development Agency by Respondent executing a written document which set-out in detail this obligation to Doris Duckett and further identified the specific collatoral and its location (which collatoral was much greater than Respondent's obligation to Doris Duckett), which net amount was the total settlement minus the expenses incurred by Respondent in the prosecution of this claim; Respondent's attorney fee for the prosecution of this claim; and attorneys' fees due Respondent for legal services performed for and at the express request of Doris Duckett on other legal matters;

8.2 Between February 1, 1974 and March 13, 1976, Respondent was not required to maintain a sufficient balance in his "Special Account" at the Clayton Bank, being account #92555200, to cover the amount due Doris Duckett from the settlement of her claim and the claim of her children for the alleged wrongful death of Thadius Duckett (husband of Doris Duckett and alleged father of her children) against Bi-State Development Agency for the reason that Doris Duckett expressly authorized Respondent to retain the net balance due her after deducting case expenses, attorney's fee for the prosecution of this claim, and attorneys' fees on other legal matters, as Respondent believed

protected her interest, which Respondent did by executing a written document which specifically identified the collatoral and its location; and

8.3 Respondent specifically denies that he committed any act in violation of Supreme Court Rule 4; DR 9-102 (A), as alleged.

Count V

9. Respondent specifically denies each and every allegation contained in Count V of paragraph 4 of the Information and in support thereof states:

9.1 In November of 1974, Respondent did convey by telephone to Doris Duckett the fact that The Reliable Life Insurance Company offered $750.00 to settle her claim and pending lawsuit against it, at that time Doris Duckett gave her express consent to settle her claim and lawsuit against The Reliable Life Insurance Company for $750.00; and

9.2 Respondent specifically denies that he committed any acts in violation of Supreme Court Rule 4; DR 1-102 (A) (1) (4) (5) (6); DR 7-101 (A) (2) (3); and DR 7-102 (A) (8), as alleged.

Count VI

10. Respondent specifically denies each and every allegation contained in Count VI of paragraph 4 of the Information and in support thereof states:

10.1 In November of 1974, Respondent did convey by telephone to Doris Duckett the fact that The Reliable Life Insurance Company offered $750.00 to settle her claim and pending lawsuit against it, at that time Doris Duckett gave her express consent to settle her claim and pending lawsuit against The Reliable Life Insurance Company for $750.00;

10.2 Respondent specifically denies that he placed, or caused to be placed, upon various documents, including a "General

Release," a "Stipulation of Settlement" and a bank draft for Seven Hundred Fifty Dollars ($750.00), what purported to be the signature of Doris Duckett, without her express or implied consent;

10.3 Respondent at all times during the settlement of the claim and lawsuit of Doris Duckett against The Reliable Life Insurance Company was acting with the express authority and consent of Doris Duckett;

10.4 Respondent is of the opinion that the signatures on the "General Release," a "Stipulation of Settlement" and a bank draft for Seven Hundred Fifty Dollars ($750.00) all executed in the settlement of the claim and lawsuit of Doris Duckett against The Reliable Life Insurance Company are that of Doris Duckett, and if they are not, then these signatures by some other person or persons were placed upon these documents at the express direction, authority and consent of Doris Duckett; and

10.5 Respondent specifically denies that he committed any acts in violation of Supreme Court Rule 4; DR 1-102 (A) (1) (3) (4) (5) (6); DR 7-1-1 (A) (3); and DR 7-102 (A) (8), as alleged.

Count VII

11. Respondent specifically denies each and every allegation contained in Count VII of paragraph 4 of the Information and in support thereof states:

11.1 In November of 1974, Respondent did convey by telephone to Doris Duckett the fact that The Reliable Life Insurance Company had offered $750.00 to settle her claim and pending lawsuit against it, at that time Doris Duckett gave her express consent to settle her claim and pending lawsuit against The Reliable Life Insurance Company for $750.00;

11.2 Respondent at all times during the settlement of the claim and lawsuit of Doris Duckett against The Reliable Life Insurance Company was acting with the express authority and consent of Doris Duckett;

11.3 During November and December of 1974, Doris Duckett expressly authorized Respondent to: First, deposit, cash and collect the proceeds from the settlement bank draft from the settlement of her claim and lawsuit against The Reliable Life Insurance Company, that after the proceeds were collected by the Respondent; Second, re-imburse Respondent for the expenses that the Respondent incurred in the prosecution of this claim and lawsuit; Third, deduct the attorneys' fees due Respondent for legal services performed for and at the express request of Doris Duckett on other legal matters; and Fifth, retain the net balance until Doris Duckett requested it;

11.4 Respondent between November of 1974 and March 13, 1976 kept Doris Duckett fully informed of the amount of the net proceed due her from the settlement of her claim and lawsuit against The Reliable Life Insurance Company;

11.5 Respondent specifically denies that he committed any acts in violation of Supreme Court Rule 4; DR 1-102 (A) (1) (4) (5) (6); and DR 9-102 (B) (1) (3) (4), as alleged.

12. Further, in response to the Information Respondent states that the evidence presented to the Informant all depended upon the veracity, truthfulness and honesty of Doris Duckett, who is unworthy of belief by her admission to perjury, contained in the record, as the prosecuting witness in a serious criminal trial which resulted in a conviction and sentence of thirty (30) years; her prior false statements and accusations concerning her sister, Flora Mae Scott; and her admitted obtaining a double payment from an attorney in an estate matter, which she returned only when threatened with criminal prosecution. Her inconsistent statements as to the facts surrounding the activities of the Respondent further tend to destroy the substantiality of her

testimony in this matter. The Informant should have totally rejected the testimony of Doris Duckett as it related to her alleged improper acts of the Respondent.

WHEREFORE, Respondent having fully answered the Information, requests this Court to issue its Order dismissing the Information, at the costs of the Informant.

/s/ DONALD M. WITTE,
Respondent

STATE OF MISSOURI
} SS
COUNTY OF ST. LOUIS

DONALD M. WITTE first being sworn upon his oath deposes and states that the facts and information set-out above are true and correct to his best knowledge, information and belief.

/s/ DONALD M. WITTE,
Respondent

Subscribed to and sworn to before me this 24th day of May, 1979.

Notary Public

My commission expires:

/s/ ROGER M. HIBBITS
950 Pierre Laclede Center
7733 Forsyth Blvd.
Clayton, Missouri 63105
314/726-2525
Attorney for Respondent

APPENDIX K

Rule 68.03, Supreme Court of Missouri

Rule 68.03. Masters in Appellate Courts

(a) Appointment and Compensation. Each appellate court in which any action is pending may appoint a master therein. The compensation to be allowed to a master shall be charged upon such of the parties, or paid out of any fund or subject matter of the action which is in the custody and control of the court, as the court may direct.

(b) Qualifications of Master. No person shall be appointed a master who is of kin to either party or is interested in the outcome of the action.

(c) Oath of Master. Before proceeding to hear any testimony in the action, a master shall take and subscribe an oath, before some officer duly authorized to administer an oath, faithfully to hear and examine the matters at issue and to make a just, impartial and true report.

(d) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the

authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 73.01(a) for a court sitting without a jury.

(e) Proceedings

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof, unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties, or their attorneys, to be held within 20 days after the date of the order of reference and shall notify the parties, or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Any party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed or, in his discretion, adjourn the proceedings to a future day, giving notice thereof to the absent party.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas issued by the clerk of the appointing court. The failure of any person to comply with the requirements of any subpoena issued as herein provided shall be reported promptly to the court issuing the subpoena.

(f) Report. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court together with a transcript of the proceedings in-

cluding the evidence and exhibits, if any. The clerk shall forthwith mail to all parties notice of the filing and a copy of the master's report.

(g) Exceptions. Any party may, but is not required to, file exceptions to the report to be ruled upon by the master. The master may amend findings of fact or make new findings of fact and conclusions of law. Exceptions shall not be permitted to any revised report by the master. The exceptions shall be filed not later than 15 days after the filing of the report by the master. If the exceptions are not passed on by the master within 30 days after filing, they are deemed denied for all purposes. The filing of exceptions with the master shall not preclude any party from alleging or asserting any point in the appellate court.

(h) Docketing. After there has been a ruling on exceptions to the report of the master, or if no exceptions are filed after the expiration of 15 days from the time the master's report was filed, the case shall be docketed for hearing in the appellate court.

APPENDIX L

Rule 4, DR 1-102 (A) (1), (5), Supreme Court of Missouri

DR 1-102. Misconduct

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(5) Engage in conduct that is prejudicial to the administration of justice.

APPENDIX M

**Rule 4, DR 9-102 (A),
9-102 (B) (1), (3) and (4),
Supreme Court of Missouri**

DR 9-102. Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

• • •

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.